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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

MYRON BATTS,
Petitioner

v.

TOW-MOTOR FORKLIFT COMPANY and
CATERPILLAR INDUSTRIAL, INC.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This Petition presents the following important question:

1. Whether a federal district court has authority pursuant to Fed. R. Civ. P. 60(b)(6) to grant an unsuccessful litigant relief from a final judgment where a subsequent decision of a state's highest court in an unrelated case makes clear that the federal district court improperly instructed the jury on state substantive law at the time of trial, over Petitioner's timely objections, and where the Petitioner was unsuccessful on appeal raising these identical issues? In this case there are additional extenuating circumstances in that the appellant unsuccessfully moved the Court of Appeals to stay the appeal pending the expected forthcoming decision of the Mississippi Supreme Court in an unrelated case which raised identical issues and questions of law as those presented in the instant case, the decision of the Mississippi Supreme Court was expected to be rendered in the immediate future and would clarify any uncertainties as to the application of state law in the context of the federal appeal, and the subsequent decision of the Mississippi Supreme Court, in fact, made clear Appellant was correct all along in his interpretation of state law which would have mandated that he be given a new trial had the case been stayed as requested.

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CITATIONS TO OPINIONS BELOW

The relevant opinions on this Petition for Certiorari are the following: (1) The opinion of the United States Court of Appeals for the Fifth Circuit affirming the jury verdict in favor of the Defendant Caterpillar, Inc., being Batts v. Tow-Motor Forklift Co., 978 F.2d 1386 (5th Cir. 1992); (2) The opinion of the United States District Court for the Northern District of Mississippi granting Myron Batts relief from the final judgment in favor of Caterpillar pursuant to Fed. R. Civ. Pro. 60(b)(6), being Batts v. Tow-Motor Forklift Co., 153 F.R.D. 103 (N.D. Miss. 1994); and (3) The opinion of the United States Court of Appeals for the Fifth Circuit reversing the decision of the District Court granting Myron Batts relief from the original final judgment, being Batts v. Tow-Motor Forklift Co., ___ F.3d ___ (No. 94-60606) (5th Cir. 1995).

JURISDICTION

This cause of action was originally filed by Plaintiff Myron Batts against Defendants Tow-Motor Forklift Company ("Tow-Motor") and Caterpillar, Inc. ("Caterpillar") in the United States District Court for the Northern District of Mississippi based on a diversity of citizenship between the parties. After the jury verdict in favor of Defendant Caterpillar,[1] the Plaintiff filed a

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[1]Tow-Motor was purchased by Caterpillar with assumed liability for products manufactured prior to the purchase.

timely appeal to the United States Court of Appeals for the Fifth Circuit. On November 25, 1992, the United States Court of Appeals for the Fifth Circuit rendered its opinion affirming judgment in favor of the Defendant. On December 23, 1992, the Court entered an order denying Appellant Myron Batts' petition for rehearing and rehearing *en banc*. On or about January 4, 1993, following the decision of the Mississippi Supreme Court in Sperry-New Holland v. Prestage, 617 So.2d 248 (Miss. 1993), Plaintiff Myron Batts moved the district court for relief from the judgment pursuant to Fed. Rule Civ. Proc. 60(b)(6) on the basis that Prestage made clear that the Plaintiff was correct all along in his interpretation of Mississippi substantive law and that the jury was clearly improperly instructed. The district court agreed and granted the Plaintiff's motion, vacated the judgment and restored the case to its active docket. The district court allowed Defendant leave, however, to file an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), which the Fifth Circuit initially denied, then agreed to hear. On October 3, 1995, the Fifth Circuit rendered its opinion reversing the decision of the district court granting Plaintiff relief under Fed. R. Civ. Proc. 60(b)(6) as being an abuse of discretion. No petition for rehearing was filed. Plaintiff Myron Batts now files this Writ of Certiorari seeking review of the decision of the Fifth Circuit reversing the district court's order granting Plaintiff relief from the final judgment in favor of Defendant.

STATEMENT OF THE CASE

Plaintiff instituted this action against Defendant Caterpillar on or about April 27, 1988. In his Complaint and Amended Complaint, Plaintiff alleged that on April 17, 1984, the Plaintiff was employed by Flavorite Laboratories in Horn Lake, Mississippi and was injured when a forklift manufactured by the Defendant backed into him, crushing his leg. Plaintiff charged that the Defendant was negligent in its design of the forklift and that the forklift was defective and unreasonably dangerous in failing to provide backup warnings, lights, mirrors and other devices so as to prevent Plaintiff's injury. Plaintiff's Complaint and Amended Complaint alleged both strict liability in tort and negligence.

This matter was subsequently tried by the United States District Court for the Northern District of Mississippi, per District Judge Glen Davidson with a jury, commencing in April 1991. At the conclusion of the proof, over Plaintiff's objections, the district court instructed the jury that under Mississippi law any "alleged danger which is open and obvious cannot be considered to be unreasonably dangerous." The Court further instructed the jury that:

> If you find from a preponderance of the evidence in this case that the operation of a forklift truck without the driver facing in the direction of travel and without sounding the manual horn to warn a pedestrian

> presents an open and obvious danger, regardless of whether the forklift was equipped with an audible backup alarm device, flashing warning lights, and/or rear view mirrors, then in that event, it is your sworn duty to return a verdict in favor of the Defendant.

These instructions, given over Plaintiff's objections, were apparently predicated on prior decisions of the United States Court of Appeals for the Fifth Circuit, applying Mississippi law, which held that Mississippi followed, exclusively, the "consumer expectations test" in determining whether a product was defective and unreasonably dangerous. Under this test, any product which contained a defect which was "open and obvious" could not, as a matter of law, be more dangerous than contemplated by the ordinary consumer and thus could not be considered defective and unreasonably dangerous under §402A as applied in Mississippi. See, e.g., Melton v. Deere & Co., 887 F.2d 1241 (5th Cir. 1989).

Because the dangers of a moving forklift are without doubt "open and obvious," the jury, as so instructed, naturally returned a verdict in favor of the Defendant. In a timely fashion, Plaintiff moved for judgment notwithstanding the verdict or, in the alternative, for a new trial contending that the district court had erred in instructing the jury that it must find for the Defendant as a matter of law in the event that the jury found the dangers of operating a forklift without

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backup warning devices, flashing signals, or a mirror to be open and obvious. This motion was denied by order of the district court dated April 30, 1991.

On May 7, 1991, Plaintiff filed a timely appeal to the Fifth Circuit from the jury verdict entered in favor of the Defendant on March 29, 1991 and from the order of the district court overruling Plaintiff's motion for judgment notwithstanding the verdict, or in the alternative, for a new trial dated April 30, 1991. On appeal, Plaintiff again asserted the district court erred in instructing the jury as to the consumer expectation test and to the effect that a open and obvious danger constituted a complete bar to Plaintiffs' claims.

Plaintiff also filed with the Fifth Circuit a motion requesting the court to stay the appeal pending the expected forthcoming decision of the Mississippi Supreme Court in a case styled Sperry-New Holland, a Division of Sperry Corporation v. John Paul Prestage and Pam Prestage, Docket No. 90-CA-0657 (now reported at 617 So.2d 248 (Miss. 1993)). In his motion, Plaintiff noted that Prestage involved identical issues to those presented by Plaintiff in the instant appeal[2], that Prestage had been

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[2]Prestage was tried before Hinds County Mississippi Circuit Judge (now Mississippi Supreme Court Justice) Fred Banks. At trial, Judge Banks denied almost identical "open and obvious" instructions offered by Sperry-New Holland. At trial, the Prestages were represented by the Clarksdale,

fully briefed and argued to the Mississippi Supreme Court well in advance of the instant appeal to the Fifth Circuit and that the expected forthcoming decision of the Mississippi Supreme Court would make clear whether under Mississippi law an open and obvious danger would preclude recovery under Mississippi product liability law.[3] By Order dated June 10, 1991, the Fifth Circuit denied Plaintiff's motion to stay. The Court also denied the Plaintiff's motion to certify the case to the Mississippi Supreme Court. On November 25, 1992, a three judge panel of the Fifth Circuit, in a 2 to 1 decision, rendered an opinion affirming the jury verdict below. See Batts v. Tow-Motor Forklift Co., 978 F.2d 1386 (5th Cir. 1992).

Mississippi firm of Merkel & Cocke. The defendant Sperry-New Holland was represented by the Jackson, Mississippi firm of Watkins & Eager. Ironically, these same firms represent the Plaintiff and Defendant, respectively, in the instant matter. Because of this representation, obviously both counsel for Myron Batts and Caterpillar were well aware of the exact issues and arguments in the Prestage appeal, and its obvious impact on the identical issues raised in Batts. The Fifth Circuit was informed of all of this in Plaintiff's motion to stay.

[3]Prestage was tried beginning April 9, 1990. Batts was not tried until April 1, 1991, almost a full year later. Thus, by the time Batts was even tried the Prestage appeal had been fully perfected.

On December 7, 1992, the Plaintiff served a petition for rehearing and rehearing of en banc requesting that the Court reconsider its decision en banc. By decision dated December 23, 1992, Plaintiff's suggestion for re-hearing en banc was denied. The Fifth Circuit's mandate issued January 4, 1993.

On March 25, 1993, Mississippi Supreme Court rendered its expected decision in Sperry-New Holland v. Prestage, 617 So.2d 248 (Miss. 1993). In Prestage, as argued by Myron Batts in the instant case, the Mississippi Supreme Court expressly recognized that it had previously adopted a "risk-utility" analysis in Whitley v. City of Meridian, 530 So.2d 1341 (Miss. 1988) and Hall v. Mississippi Chemical Express, Inc., 528 So.2d 796 (Miss. 1988). The Court further expressly rejected the analysis of a long line of Fifth Circuit decisions, including the decision of the Fifth Circuit in Batts, that Mississippi had adhered solely to the "consumer expectations" standard articulated by the Fifth Circuit. Prestage, 617 So.2d at 256. The Court further noted that:

> Having here reiterated this Court's adoption of a "risk-utility" analysis for products liability cases, we hold, necessarily that the "patent danger" bars no longer applicable in Mississippi. Under a "risk-utility" analysis, the "patent danger" rule does not apply. In "risk-utility," the openness and obviousness of a products design is simply a factor to

> consider in determining whether a product is unreasonably dangerous.

Prestage, Id. at n. 4.

As is evident from the Mississippi Supreme Court's decision in Prestage, the jury in the instant action was improperly instructed on the law, particularly to the effect that if the jury found that the danger associated with the forklift in question was open and obvious it must find for the Defendant as a matter of law. As is evident from the foregoing, Plaintiff properly objected to the Defendant's jury instructions incorporating the patent danger rule. Upon the Court's granting of the Defendant's requested instructions, and the subsequent verdict in favor of the Defendant, Plaintiff took every step necessary to preserve the issue on appeal, including a direct request that the Fifth Circuit stay its decision and/or certify the case pending the expected outcome of the Mississippi Supreme Court's decision in Prestage. As evident, all of Plaintiff's timely efforts to preserve the issue nevertheless failed.

On the heels of Prestage, however, on April 19, 1993, Myron Batts moved the district court pursuant to Fed. R. Civ. P. 60(b)(6) for relief from the final judgment in favor of Caterpillar. This rule, of course, provides that "on motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for...any other reason justifying relief from the operation of the judgment." In

his motion, Myron Batts noted that he had raised identical issues to those presented in Prestage, that he had done everything within his power to convince the Fifth Circuit and the district court below that the jury had been improperly instructed, that but for the Fifth Circuit's unreasonable refusal to stay his appeal, Plaintiff would be entitled to a new trial, and that justice dictated that he be given a new trial on proper jury instructions.

On February 8, 1994, United States District Judge Glen Davidson entered an order and memorandum opinion granting the Plaintiff's motion for relief from the court's final judgment. In his memorandum opinion, the district judge concluded:

> The Court has considered Batts' Motion for Relief from Judgment in light of the [Seven Elves, Inc. v. Eskenazi, 635 F.2d 396 (5th Cir. 1981)] factors and mindful that Rule 60(b)(6) relief from judgment is reserved for extraordinary circumstances. Obviously, the respect for the finality of judgment must be weighed against the Court's principle interest that substantial justice be achieved with each case. To this end, this case falls within that "extraordinary" category....
>
> For reasons which are explained in this Opinion, Myron Batts' Motion for Relief from Final Judgment pursuant

> to Rule 60(b)(6) is well taken and the same will be granted by separate order to issue this date. This Court's final judgment in this case sub justice entered on or about April 3, 1991 is vacated and the case is returned to the undersigned's active docket.

Defendant Caterpillar subsequently moved the district court to reconsider, or in the alternative, amend the order granting relief from the final judgment and/or to certify an interlocutory appeal to the Fifth Circuit. On April 11, 1994, the district court entered an order denying the Defendant's motion to reconsider but granting the Defendant's motion to amend the February 8, 1994 order to allow an interlocutory appeal. In granting the Defendant's request for an interlocutory appeal the court held:

> This case squarely presents a controlling question of law for which there is a substantial ground for a difference in opinion. Specifically, the key inquiry concerns the time, or date, when Mississippi products liability law changed from the consumer expectation test for defining "unreasonably dangerous--defective condition" to the risk utility approach.

From this order, Defendant Caterpillar filed with the Fifth Circuit a petition for permission to appeal under 28 U.S.C. §1292(b).

On May 24, 1994, the Fifth Circuit entered an order denying Caterpillar's petition to appeal from an interlocutory order. In its order, the Court stated:

> The question certified by the district court with respect to the date on which the risk-utility test became applicable under Mississippi's products-liability law does not involve a controlling question of law to which there is a substantial ground for a difference of opinion. This issue has been determined by the Mississippi Supreme Court, and this Court is bound by that determination. See Sperry New-Holland, A Div. of Sperry Corp. v. Prestage, 617 So.2d 248, 253 (Miss. 1993); Batts v. Tow-Motor Forklift Co., 978 F.2d 1386, 1389 (5th Cir. 1992).
>
> This Court may consider issues other than the certified question only if the interlocutory appeal has been properly filed and accepted.... Because the certified question does not present a question of law to which there is a substantial ground for difference of opinion, the Petitioner cannot obtain an interlocutory appeal of the Rule 60(b) issue.

From this order, Caterpillar subsequently moved the district court to

restate the controlling question and to re-certify the issue to the Fifth Circuit.

On August 1, 1994, the district court entered a further order re-stating the controlling question of law and re-certifying an interlocutory appeal. In his order, the district judge stated:

> This case presents a controlling question of law for which there is a substantial ground for a difference of an opinion and from which an immediate appeal would materially advance the ultimate termination of this litigation as well as the progress of other cases which are similarly situated. Specifically, the controlling question of law is as follows: was it proper for this district court to grant Plaintiff's Rule 60(b)(6) motion for relief from judgment, in light of the Mississippi Supreme Court's decision in Sperry-New Holland v. Prestage, 617 So.2d 248 (Miss. 1993), after the judgment had been entered by the district court and confirmed by the Circuit Court of Appeals on direct review?

From this order, Defendant Caterpillar again filed a petition for permission to appeal under 28 U.S.C. §1291(b). This petition was granted by the Fifth Circuit on September 2, 1994.

On October 3, 1995, the Fifth Circuit rendered its opinion reversing the district court and reinstating the original judgment in favor of Caterpillar See Batts v. Tow-Motor Forklift, Co, ____ F.3d ____ (5th Cir. 1995). By this writ, Plaintiff now seeks review of the decision of the Fifth Circuit.

ARGUMENT FOR ALLOWANCE OF WRIT

Federal Rule of Civil Procedure 60(b)(6) provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for...(6) any other reason justifying relief from the operation of the judgment.

Rule 60(b) was intended to confer broad discretion on the trial court to grant relief when appropriate to accomplish justice. See, e.g., Stipelcovich v.Sand Dollar Marine, Inc., 805 F.2d 599, 604 (5th Cir. 1986) citing Laguna Royalty Co. v. Marsh, 350 F.2d 817, 822 (5th Cir. 1965) ("[R]ule 60(b) is to be liberally construed to do substantial justice.") Cf. Hibernia National Bank v. Administracion Central Sociedad Anonima, 776 F.2d 1277, 1279 (5th Cir. 1985) ("[R]ule 60(b)(6) is to be liberally construed so that doubtful cases may be resolved upon the merits.") "Clause (6) is a residual clause used to cover unforeseen contingencies; that is, it is a means for accomplishing justice in exceptional circumstances."

Stipelcovich, 805 F.2d at 604-5 (cites omitted). It is properly invoked where there are extraordinary circumstances, or where the judgment may work an extreme and undue hardship and should be liberally construed when substantial justice will thus be served. Stipelcovich, 805 F.2d at 604. As noted by United States Supreme Court Justice Black:

> In simple English, the language of the "other reason" clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.

Klapprot v. United States, 335 U.S. 601, 614-615 (1949). As recognized by Judge Davidson below, numerous courts have recognized that a post-decision change or clarification in controlling law may, in appropriate cases, constitute "extraordinary circumstances" warranting Rule 60(b)(6) relief. See, e.g., Ritter v. Smith, 811 F.2d 1398, 1401-1403 (11th Cir. 1987) (subsequent decision of U.S. Supreme Court made appellate decision clearly erroneous; factors, including the fact that prior judgment remained unexecuted, minimal delay between finality of judgment and motion for Rule 60(b)(6) relief, close relationship between issues decided, and considerations of comity constituted "extraordinary circumstances" warranting 60(b)(6) relief); Wilson v. Fenton, 684 F.2d 249, 261 (3rd Cir. 1982) ("a decision of the Supreme Court of the United States or a court of appeals may

provide the extraordinary circumstances for granting a Rule 60(b)(6) motion...."); Pierce v. Cook & Co., 518 F.2d 720 (10th Cir. 1975) cert. denied 423 U.S. 1079 (1976). See also Matarese v. LeFevre, 801 F.2d 98, 106 (2nd Cir. 1986); McGrath v. Potash, 199 F.2d 166 (D.C. Cir. 1952); Adler v. Berg Harmon Associates, 790 F.Supp 1235 (S.D.N.Y. 1992). See generally Romero v. City of Ponmona, 883 F.2d 1418, 1423 (9th Cir. 1989); Cox v. Wyrick, 873 F.2d 200, 201 (8th Cir. 1989) cert. denied 110 S.Ct. 105; In re disclosure of Grand Jury Material, 821 F.2d 1290 (7th Cir. 1987) (independent action in equity based change in law; consideration same as Rule 60(b)(6)); Kern-Tulare Water District v. City of Bakerfield, 634 F.Supp. 656 (E.D.Cal. 1986) aff'd in part, rev'd in part, 828 F.2d 514 (court may reconsider ruling based on change in controlling law); First American National Bank of Nashville v. Bonded Elevator, Inc., 111 F.R.D. 74 (W.D.Ky. 1988) (defendant entitled to relief from final judgment where law relied upon by district court subsequently overturned by state supreme court); Atkins v. Marathon Le Tourneau Co., 130 F.R.D. 625 (S.D. Miss. 1990) (change in controlling law may provide basis to alter or amend judgment under Rule 59(e)); Digicourse, Inc. v. AMA Distributors, Inc., 113 F.R.D. 35 (E.D. La. 1986) (under Rule 60(b)(6), change in applicable law may dictate relief in extraordinary circumstances); Ben Hur Construction Co. v. Goodwin, 116 FRD 281 (E.D. Mo. 1987) (decision of U.S. Supreme Court may provide extraordinary circumstances under Rule 60(b)(6)).

CONCLUSION

The decision of the Fifth Circuit in the instant case is that the District Judge abused his discretion in granting Plaintiff relief from the final judgment pursuant to Rule 60(b)(6). This holding is inconsistent with the stated purpose of the rule, see Klapprot v. United States, 335 U.S. at 614-615, and with decisions of other appellate decisions, see, e.g., Pierce v. Cook, 518 F.2d at 720. There are no decisions of this Court known to Petitioner which specifically address the scope of a federal judge's discretion under Rule 60(b)(6). Because of the importance of this issue, and the inconsistency by which it has been interpreted and applied by lower federal courts, guidance is needed from this Court. Petitioner urges the Court to grant certiorari on this important issue.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 94-60606

MYRON BATTS,

Plaintiff-Appellee,

versus

TOW-MOTOR FORKLIFT COWANY and
CATERPILLAR, INC.,

Defendants,

CATERPILLAR, INC.,

Defendant-Appellant.

Appeal from the United States
District Court for the Northern
District of Mississippi

Before JOLLY and BENAVIDES, Circuit Judges, and FITZWATER, District Judge.*
FITZWATER, District Judge:

*District Judge of the Northern District of Texas, sitting by designation.

We are asked to decide in this case Erie[1] whether a change in state decisional law - in this instance, Mississippi's conversion from the "consumer expectations" to the "risk-utility" test in products liability actions--constituted an extra ordinary circumstance that vested the district court with discretion to grant Fed. R. Civ. P. 60(b)(6) relief. Because we hold that it did not, we reverse.

I.

The relevant background facts are set out in our prior opinion in this case, see Batts v. Tow-Motor Forklift Co., 978 F.2d 1386, 1387-88 (5th Cir. 1992) ("Batts I"), and in the district court's decision below. See Batts v. Tow-Motor Forklift Co., 153 F.R.D. 103, 104-05 (N.D. Miss. 1994) ("Batts II"). We therefore recount them only briefly, adding subsequent procedural facts that necessarily were not set out in those opinions.

In 1984 plaintiff-appellee Myron Batts ("Batts") was injured when a coworker using a forklift collided with Batts. Batts I, 978 F.2d at 1388. The coworker hit Batts as he was operating a "tugger"--a type of motorized forklift that a person walks behind and guides--as the coworker was operating his forklift in reverse, but without sounding the equipment's manual horn. Id. at 1387-88. The forklift was

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[1]Erie R.R. Co. v. Thompkins, 304 U.S. 64 (1938).

generally maneuvered equally in reverse and in forward. Id. at 1387.

In 1988 Batts brought a diversity action against defendant Tow-Motor Forklift Company, the manufacturer of the forklift, and its successor-in-interest, defendant-appellant Caterpillar Industrial, Inc. ("Caterpillar"), alleging inter alia theories of negligence and strict liability. Id. at 1388. The case was tried in March 1991. Batts II, 153 F.R.D. at 104. Batts introduced evidence at trial to prove that the forklift should have been equipped with a back-up alarm, flashing warning lights, and/or rearview mirrors, and that this failure entitled him to recover on the basis of strict liability (defective and unreasonably dangerous product) or negligence (negligent design). Batts I, 978 F.2d at 1388. Caterpillar presented evidence that there was no restriction on the operator's visibility to the rear, and that there was a danger in the operator's relying on alarms, lights, or mirrors rather than simply looking in the direction of travel. Id.

One of Caterpillar's principal defenses was that the absence of the devices on which Batts relied to establish liability, coupled with the danger of the forklift operator's not facing the direction of travel, was open and obvious to the forklift owner (Batts' employer) and to users (the employee operators), thus barring recovery by Batts under Mississippi law. Id.; See Batts II, 153 F.R.D. at 104 (To this end, such open and obvious danger was a complete bar to recovery under Mississippi law.). Over Batts'

objection, the trial court instructed the jury on Caterpillar's "open and obvious" defense, Batts II, 153 F.R.D. at 104-05, charging the jury that an open and obvious danger could not render the product unreasonably dangerous. Batts I, 978 F.2d at 1391. The court also directed the jury to find whether the defect was open and obvious to a reasonable and prudent user, and instructed the jury that if it so found, it was to render a verdict in favor of Caterpillar. Id. at 1392. The jury returned a verdict for Caterpillar.

Following denial of his post-verdict motions, Batts appealed to this court and moved the court to stay the appeal pending the Mississippi Supreme Court's expected decision in Sperry-New Holland v. Prestage, 617 So.2d 248 (Miss. 1993), an unrelated and as yet undecided case then pending before that court. A panel of this court denied the motion in June 1991. We later affirmed the judgment in favor of Caterpillar. Batts I, 978 F.2d at 1397. We filed our opinion on November 25, 1992, and denied a petition for rehearing and rehearing en banc on December 23, 1992. Our mandate issued on January 4, 1993.

In 1991, when the case was tried, and in 1992, when we decided Batts' appeal, we understood Mfississippi to follow the consumer expectations rather than risk-utility test in strict liability actions. See Id. at 1392; Melton v. Deere & Co., 887 F.2d 1241,

1243 (5th Cir. 1989).[2] In Batts I we noted that "our court has held . . . that there is no strict liability in tort under Mississippi law for a patent--open and obvious--danger." Batts I, 978 F.2d at 1392. Batts conceded that our decisions "support[ed] Caterpillar's contention that the consumer expectation test applies, as opposed to a risk utility analysis." Id. (footnote omitted). He urged, however, that we had misinterpreted Mississippi law. Id. at 1392-93. We disagreed with Batts' analysis, holding that the cases on which he relied "do not persuade us that Mississippi has fundamentally shifted its test from one of consumer expectation to risk utility." Id. We also held that even if we agreed with Batts, we were still bound by the prior panel opinion in Melton. Id. & n. 15. We declined to certify the issue to the Mississippi Supreme Court, noting that "[o]ur law is clear" and that "the Mississippi law upon which our precedent is based is unchanged." Id. at n. 16.

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[2]Judge Reavley disagreed with this circuit's interpretation of Mississippi law. See Melton, 887 F.2d at 1246-48 (Reavley, J., dissenting) (urging that Mississippi does not apply "consumer expectations" test to determine whether product design is defective); Satcher v. Honda Motor, F.3d 1311, 1314 n.2 (5th Cir. 1995) (Reavley, J.). Our more recent opinions recognize the change to risk utility analysis. See, e.g., Williams V. Briggs Co. 62 F.3d 703, 705 (5th Cir. 1995).

On March 25, 1993--subsequent to issuance of our mandate on January 4, 1993--the Mississippi Supreme Court filed its opinion in Prestage holding that Mississippi applied the risk--utility test of products liability, and that it had done so since 1988. Prestage, 617 So.2d at 252, 254-55. Prestage involved a suit for injuries caused when the plaintiffs leg was caught in a combine manufactured by Sperry-New Holland, requiring amputation of the lower portion of the plaintiff's leg. Prestage sued Sperry-New Holland on strict liability and negligent design theories. The trial court instructed the jury using risk-utility analysis, and it returned a verdict for the plaintiff. Id. at 251.

On appeal, the Mississippi Supreme Court affirmed, reasoning that it had moved away from consumer expectations analysis in two 1988 decisions, Hall v. Mississippi Chemical, Inc., 528 So.2d 796 (Miss. 1988), and Whittley v. City of Meridian, 530 So.2d 1341 (Miss. 1988). Prestage, 617 So.2d at 254-55. The court noted that most courts employ the risk-utility test, and that this standard protects both manufacturers and consumers by requiring that manufacturers make products that are reasonably safe under all circumstances, as opposed to absolutely safe unless the danger is facially apparent. Id. at 256. The court expressly rejected this court's conclusion in Melton, 887 F.2d at 1243, that Whittley had not altered the test for strict liability. Prestage, 617 So.2d at 255. The court held that an open and obvious danger was not an absolute bar to recovery. Id. at 256 n.4.

On April 19, 1993 Batts filed in the district court below a Rule 60(b)(6) motion, urging the court on the basis of Prestage to relieve him from the adverse judgment. See Batts II, 153 F.R.D. at 109. The district court granted Batts' motion, vacated the judgment in favor of Caterpillar, and restored the action to the court's active docket. Id. at 104, 109-10. The court stated that it had considered the factors of Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 402 (5th Cir. 1981), but did not explain how it had weighed any particular factor in reaching its decision. See Batts II, 153 F.R.D. at 109-10. It is otherwise clear from the district court's opinion, however, that the court granted Rule 60(b)(6) relief on the ground that it had applied the consumer expectations test at trial in March 1991, notwithstanding that Mississippi law had converted to the risk-utility test in 1988. Id. at 104 (holding "that the jury was improperly instructed on Mississippi products liability law when this case went to trial in March of 1991"), id. (recognizing "the retroactive rule of Prestage"), & 106-07 (observing that Prestage announced that Mississippi products liability law had changed in 1988).

The district court thereafter granted Caterpillar leave to take an interlocutory appeal of the order, and stayed all proceedings below. A panel of this court first denied, and later granted, leave to appeal.

Caterpillar asks us to reverse the order of the district court and reinstate the prior judgment in its favor.

II.

A.

Rule 60(b)(6) provides that a court may "relieve a party ... from a final judgment ... for ... any other reason justifying relief from the operation of the judgment." Rule 60(b) sets out five specific bases for granting relief from a final judgment, followed by clause (b)(6). We have held that this clause's "'any other reason' language refers to any other reason than those contained in the five enumerated grounds on which a court may grant a Rule 60(b) motion." Government Fin. Servs. One Ltd. Partnership v. Peylon Place, Inc., 62 F.3d 767, 773 (5th Cir. 1995) (citing cases). Although we frequently have recognized that "'Rule 60(b)(6) is a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses,'" e.g., id. (quoting Harrel v. DCS Equip. Leasing Corp., 951 F.2d 1453 (5th Cir. 1992)), we have also narrowly circumscribed its availability, holding that Rule 60(b)(6) relief will be granted only if extraordinary circumstances are present." Bailey v. Ryan Stevedoring Co., 894 F.2d 157, 160 (5th Cir.) (affirming order denying Rule 60(b)(6) motion based on change in federal law) (citing Ackermann v. United States, 340 U.S. 193 (1950)), cert. denied 498 U.S. 829 (1990); Government Fin. Servs. 62 F.3d at 774; American Totalisator Co. v. Fair Grounds Corp., 3 F.3d 810, 815-16 (5th Cir. 1993).

B.

The district court granted Batts' Rule 60(b)(6) motion on the ground that the case had been tried under the consumer expectations test, when Mississippi had in fact converted earlier to the risk-utility test. See Batts II, 153 F.R.D. at 104, 106-07. We review the district court's decision for abuse of discretion. New Hampshire Ins. Co. v. Martech USA, Inc., 993 F.2d 1195, 1200 (5th Cir.1993).

At the time this case was tried, the law of this circuit--reiterated in 1989 in Melton--was that Mississippi followed the consumer expectations test. Melton was decided after the 1988 decisions in Hall and Whittley, which the Mississippi Supreme Court said in Prestage changed the state's products liability law. Prestage, 617 So.2d at 255. Subsequent to Melton no case was rendered that indicated that Melton's analysis of Mississippi law was incorrect. Batts I, 978 F.2d at 1393. In 1991 the district court was therefore obligated to try the case under the consumer expectations test, because it was bound by our interpretation of state law absent a subsequent state court decision or statutory amendment that rendered this court's prior decision clearly wrong. See Ginsberg 1985 Real Estate Partnership v. Cadle Co., 39 F.3d 528, 534 (5th Cir. 1994). Our affirmance of the district court's instructions based on the consumer expectations test makes pellucid that the trial court correctly followed state law as we had interpreted it. See Batts I, 978 F.2d at 1392-93.

The district court vacated the judgment in favor of Caterpillar on the basis of a change in decisional law announced after the 1991 trial and 1992 affirmance. In Bailey, we stated that "[a] change in decisional law after entry of judgment does not constitute exceptional circumstances and is not alone grounds for relief from a final judgment."[3] Bailey, 894 F.2d at 160 (citing McKnight v. United States Steel Corp., 726 F.2d 333, 336 (7th Cir. 1984); Title v. United States, 263 F.2d 28, 31 (9th Cir.), cert. denied, 359 U.S. 989 (1959).[4] Accordingly, because this change from the consumer expectations test to the risk-utility test did not constitute an extraordinary circumstance sufficient to justify Rule 60(b)(6) relief, we hold that the district court abused its discretion when it granted Batts' motion and vacated the judgment. See id. at 160.[5]

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[3]This statement is dicta because the panel had already held that Rule 60(b)(6) relief was unavailable to appellant because he had also sought relief on the basis of Rule 60(b)(5).

[4]In Picco v. Global Marine Drilling Co., 900 F.2d 846, 851 (5th Cir. 1990), we cited Bailey with approval in determining that it was an abuse of discretion for the district court to grant relief where the Supreme Court had changed the applicable rule of law.

[5]Our decision in Satcher v. Honda Motor Co., 993 F.2d 56 (5th Cir. 1993), is not to the contrary. Although in

C.

We think a proper understanding of the limited circumstances in which post-judgment relief is available when decisional law changes, and of our role as an Erie court attempting to determine and apply state law, supports the conclusion that a change in state decisional law, rendered after this court makes an Erie prediction, will not normally constitute an extraordinary circumstance, and cannot alone be grounds for relief from a fmal judgment pursuant to Rule 60(b)(6).[6]

Satcher we vacated our opinion after the Prestage decision was announced, we did so while the appeal was pending on rehearing. Id. at 57. The Mississippi Legislature had enacted House Bill 1270, codifying various elements of Mississippi conunon law regarding products liability, and the Mississippi Supreme Court had decided Prestaple while the petition for rehearing in Satcher was still pending. Id. We held that these events, occurring after the panel decision but prior to a ruling on rehearing, had the potential to alter drastically Mississippi products liability law. Accordingly, we vacated and remanded so that the district court could address the parties' arguments and apply the new law to the facts of the case. Id. at 57-58.

[6]We do not hold that a change in decisional law can never be an extraordinary circumstance. Courts may find a special circumstance warranting relief where a change in the law affects

a petition for habeas corpus, where notions of finality have no place. Matarese v. LeFevre 801 F.2d 98, 106 (2d Cir. 1986) (denying relief where subsequent Supreme Court decisions indicated that change in law had not, in fact, occurred), cert. denied, 480 U.S. 908 (1987). Relief has also been found appropriate where the erroneous judgment has not yet been executed, where an appeal or remand of the case is still pending, or the judgment is not final. See Adams V. Merrill Lynch Pierce Fenner & Smith, 888 F.2d 696, 702 (10th Cir. 1989) (affirming district court relief from judgment where Supreme Court altered law regarding arbitration of securities claims while claims were pending); Wilson v. Al McCord Inc., 858 F.2d 1469, 14787-79 (10th Cir. 1988) (vacating and remanding where change in state law while appeal was pending made it neccesary for parties to develop more fully the factual record); Overbee v. Van Waters & Rogers 765 F.2d 578, 580 (6th Cir. 1985) (holding on the basis of "the unique facts of this case" that district court abused its discretion in denying Rule 60(b)(6) relief where, at time plaintiff filed motion, judgment was not final, and action of Ohio Supreme Court of reversing itself within one year was certainly unusual). Rule 60(b)(6) may also warrant relief where the subsequent court decision is closely related to the case in question, such as where the Supreme Court resolves a conflict between another circuit ruling and that case. See, e.g., Ritter v. Smith 811 F.2d 1398, 1402-03 (11th Cir.), cert. denied, 483 U.S. 1010 (1987). Similarly, where two cases

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"Numerous courts have held that the mere showing of a change in the law is not enough to demonstrate such an extraordinary situation when the judgment has become final." Overbee V. Van Waters & Rogers, 765 F.2d 578, 580 (6th Cir. 1985).

Absent some showing of extraordinary circumstances, courts have refused to vacate their prior judgments where they correctly applied federal law, and a subsequent Supreme Court ruling changed the law. See, e.g., Travelers Indem. Co. v. Sarkisian, 794 F.2d 754, 757 (2d. Cir.) (denying Rule 60(b)(6) relief where Supreme Court reversed ruling on claims for indemnity under RICO statute after entry of final judgment), cert. denied, 479 U.S. 885 (1986). A party seeking relief under Rule 60(b) cannot simply cite a new Supreme Court decision to support its motion; it must present proof that enforcement of the judgment would work an injustice. DeFillips v. United States, 567 F.2d 341, 344 (7th Cir. 1977), overruled in part on other grounds by United States v. Chicago, 663 F.2d 1354 (7th Cir. 1981). The required showing is substantial. See Dowell v. Board. of Educ. of Oklahoma City Pub. Sch., 8 F.3d 1501, 1509 (10th Cir.

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arising out of the same transaction result in conflicting judgments, relief has been found to be warranted. See Pierce v. Cook & Co., 518 F.2d 720, 723 (10th Cir. 1975), cert. denied, 423 U.S. 1079 (1976).

1993). Even where the judgment provides injunctive relief, and thus has an ongoing effect, courts may refuse a Rule 60(b)(6) motion founded upon the Supreme Court's announcement of a new rule of law. Id.

Changes in decisional law based on constitutional principles are not of themselves extraordinary circumstances sufficient to justify Rule 60(b)(6) relief. For instance, in Collins v. City of Wichita, 254 F.2d 837 (10th Cir. 1958), a plaintiff challenged the constitutionality of a Kansas statute relating to the notice landowners received in condemnation actions. The plaintiff lost at trial and on appeal. Over one year later, the Supreme Court held the Kansas statute unconstitutional and plaintiff sought relief from the adverse judgment. The Tenth Circuit affirmed the district court's denial of the motion, finding that "a judicial change in the court's view of the law after its entry, does not justify setting it aside." Id. at 839.

A circuit court's announcement of a new rule of federal law, like a Supreme Court pronouncement, is similarly insufficient without more to justify Rule 60(b)(6) relief. See Ashland Oil, Inc. v. Delta Oil Prods. Co., 806 F.2d 1031, 1033-34 (Fed. Cir. 1986) (denying relief where no evidence presented that continued operation of judgment would cause unjust result). In Tomlin v. McDaniel, 865 F.2d 209 (9th Cir. 1989), for example, plaintiff s 42 U.S.C. §1983 action was dismissed pursuant to a Ninth Circuit ruling that the statute of limitations for such suits was one year. After the Supreme Court denied plaintiff

s petition for a writ of certiorari, the circuit court held in Stephan v. Dowdle, 733 F.2d 642 (9th Cir. 1984), that imprisonment tolled the statute. The Supreme Court announced in Wilson v. Garcia, 471 U.S. 261 (1985), that the limitations period should be equal to that for state personal injury actions. Under either case, plaintiffs action would have been timely. In affirming the district court's denial of plaintiff s motion for Rule 60(b)(6) relief, the court stated, "[plaintiff] appealed and the judgment against him became final before the laws changed. That is the rock on which his arguments founder." Tomlin, 865 F.2d at 211.

2.

Our role as an Erie court strengthens, rather than undermines, the proposition that a change in decisional law is insufficient to constitute an extraordinary circumstance. "In diversity cases, we apply substantive state law." Rogers v. Corrosion Prods., Inc., 42 F.3d 292, 295 (5th Cir.), cert. denied ___ U.S. ___, 115 S.Ct. 2614 (1995). Our position is analogous to a state intermediate court. Transcontinental Gas Pine Line Corp. v. Transportation Ins. Co., 953 F.2d 985, 988 (5th Cir. 1992). "This court is Erie-bound to apply state law as it currently exists, and may not change that law or adopt innovative theories of recovery." Solomon v. Walgreen Co., 975 F.2d 1086, 1089 (5th Cir. 1992) (per curism) (citing cases).

"In order to determine state law, federal courts look to final decisions of the highest court of the state. When

there is no ruling by the state's highest court, it is the duty of the federal court to determine as best it can, what the highest court of the state would decide." Labiche v. Legal Sec. Ins. Co., 31 F.3d 350, 351 (5th Cir. 1994) (per curism) (quoting Transcontinental, 953 F.2d at 988). "In deciding an unsettled point of [Mississippi] state law, Erie requires that we determine how the Mississippi Supreme Court would interpret its own law if presented with the question." Lawrence v. Virginia Ins. Reciprocal, 979 F.2d 1053, 1055 (5th Cir. 1992) (citing American Waste & Pollution Control Co. v. Browning-Ferris Inc., 949 F.2d 1384, 1")86 (5th Cir. 1991)); Batts 1, 978 F.2d at 1389. "When we are required to make an Erie guess, it is not our role to create or modify state law, rather only to predict it. Lawrence, 979 F.2d at 1055; Batts I 978 F.2d at 1389.

The general rule that a change in decisional law will not ordinarily warrant Rule 60(b)(6) relief has greater force in an Erie case because in this context a federal court is doing no more than fulfilling its obligation scrupulously to determine how a state court would decide a question. We find the Second Circuit's well-reasoned opinion in DeWeerth v. Baldinger, 38 F.3d 1266 (2d Cir.), cert. denied, ___ U.S. ___, 115 S.Ct. 512 (1994), to be particularly instructive.

Erie requires that diversity courts follow state law on substantive matters not govemed by the Constitution or by federal law. Id. at 1272. The court is not required to be prescient. Instead,

"[w]hen confronted with an unsettled issue of state law, a federal court sitting in diversity must make its best effort to predict how the state courts would decide the issue." Id. at 1273. Erie and its progeny require no more of a federal court than conscientiously to satisfy its duty to predict how the state court will decide a question. See Id. at 1274.

"However, the fact that federal courts must follow state law when deciding a diversity case does not mean that a subsequent change in the law of the state will provide grounds for relief under Rule 60(b)(6)." Id. at 1272-73. Erie contemplates that on any open question of state law, a federal as opposed to a state court will determine the applicable rules of law. See id. at 1273. That a subsequent state court resolves the question differently does not render the federal diversity court decision invalid, or mar the proceeding as unfair. Id.

> The very nature of diversity jurisdiction leaves open the possibility that a state court will subsequently disagree with a federal court's interpretation of state law. However, this aspect of our dual justice system does not mean that all diversity judgments are subject to revision once a state court later addresses the litigated issues. Such a rule would be tantamount to holding that the doctrine of finality does not apply to diversity judgments, a theory

> that has no basis in Erie or its progeny.

Id. at 1273-74.

Consistent with the reasoning and result of DeWeerth are cases such as Dowell v. State Farm Fire and Cas. Auto Ins. Co., 993 F.2d 46 (4th Cir. 1993), and Seese v. Volkswagenwerk A.G., 679 F.2d 336 (3d Cir. 1982). In Dowell the Fourth Circuit affirmed the district court's denial of a Rule 60(b) motion where a plaintiff sought relief on the basis of a West Virginia Supreme Court ruling that changed the uninsured motorist law. Analyzing the motion under both Rule 60(b)(5) and (6), the Fourth Circuit held, in relevant part, that "a change in decisional law subsequent to a final judgment provides no basis for relief under Rule 60(b)(6)." Id. at 48. The Third Circuit held in Seese that after the court of appeals affirms a judgment and the Supreme Court denies a petition for a writ of certiorari, the case is no longer sub judice, and a Rule 60(b)(6) motion provides no basis for relief. Seese, 679 F.2d at 337. The court affirmed the district court's denial of a defendant's Rule 60(b)(6) motion, which was based on a Fourth Circuit ruling that North Carolina would not recognize the negligent design theory upon which the plaintiff had recovered. The Third Circuit rejected the argument that Erie required that it apply the new law to a case no longer sub judice. Id. It quoted with approval the district court's opinion, in which the court stated that, "Even if it were true... that we have incorrectly guessed as to what North Carolina law would ultimately

be, that would not be cognizable under Rule 60 this time." Id.

D.

Batts emphasizes that this case presents an extraordinary circumstance because he requested that this court stay the appeal in Batts I pending the Mississippi Supreme Court's anticipated ruling in Prestage. We find nothing in the district court's opinion to indicate that it exercised its discretion on the basis of Batts' motion for a stay of the appeal. The district court's opinion does not mention the request. Instead, as we have noted, the court below granted relief on the ground that it had incorrectly instructed the jury conceming the consumer expectations test, which had been replaced by the risk-utility test three years prior to the Batts trial. Because we are reviewing the district court's decision under an abuse of discretion standard, and since this factor apparently played no role in the court's exercise of its discretion, we hold that Batts' request for a stay does not change our analysis.[7]

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[7]Batts also relies on Pierce, in which the Tenth Circuit granted relief from summary judgment where the state law precedent upon which the district court relied was subsequently overruled. Pierce presented extraordinary circumstances in that separate state and federal actions arose from the same incident and involved the same parties. In DeWeerth, 38 F.3d at 1274-75, the Second Circuit distinguished on grounds with which we agree.

* * *

Batts did not present an extraordinary circumstance that warranted Rule 60(b)(6) relief. The district court therefore abused its discretion in,granting Batts' motion. The order vacating the final judgment below is therefore

REVERSED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1511

MYRON BATTS,

Plaintiff-Appellant,

VERSUS

TOW-MOTOR FORKLIFT COMPANY
and CATERPILLAR INDUSTRIAL, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi

Before BRIGHT,[1] JOLLY, and BARKSDALE, Circuit Judges.
BARKSDALE, Circuit Judge:

At issue in this Mississippi diversity action is whether, under its products liability law, recovery against a product's manufacturer by an injured non-user of that product (a bystander) is barred if the product defect or danger is open and obvious to an ordinary user, regardless of whether the

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[1]Senior Circuit Judge of the Eighth Circuit, sitting by designation.

bystander knew, or should have known, of the danger. Myron Batts was injured when a forklift operated by a co-employee backed into him. Batts sued the forklift manufacturer, claiming that the lack of any mirror or back-up warning device on the forklift rendered the manufacturer liable under the theories of negligence and strict liability in tort. A jury returned a verdict for the manufacturer, after being instructed that Batts, a bystander, could not recover under either theory if it found that the danger was open and obvious. For both theories of liability, this ws a correct statement of the law; we AFFIRM.

I.

Batts was employed in Mississippi by Flavorite Laboratories, Inc. His duties included operating a type forklift called a "tugger"[2] in a room which was often noisy. In that room, at least one forklift operated in addition to Batts' tugger. On the day Batts was injured in 1984, a co-employee, Charles Johnson, was operating a forklift manufactured in 1965 by Towmotor Corporation.[3] (Towmotor was purchased by Caterpillar.) The forklift was operated by a seated driver using controls to his front, as are the lift forks, and is generally operated in reverse as often as forward. At the time of manufacture, Towmotor produced

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[2] A tugger is motorized; and the operator walks behind and guides it.

[3]Flavorite purchased the forklift from a third party in 1980.

forklifts with load capacities ranging from 2,000 to 60,000 pounds. The forklift in issue had a 2,500-pound capacity and was designed for use in warehouses and other indoor areas. The forklift collided with Batts when Batts was backing, and walking beside, the tugger; and Johnson was operating the forklift in reverse, but without sounding its manual horn.

Although neither party contends that a back-up alarm sounded on the forklift before it hit Batts, whether any such device was then in place is disputed (as discussed in note 6, *infra*, concerning Caterpillar's superseding proximate cause defense). After the accident, electrical alarms and flashing lights were installed on the forklifts at Flavorite. These items were available when the forklift was manufactured in 1965 and could be installed at customer request. However, they were not standard options on Towmotor forklifts of the capacity involved in this case. Indeed, no American manufacturer so offered them. Caterpillar's witnesses opined that the need for back-up warning devices depends on the customer's application and that their use is appropriate when an operator's visibility is restricted.

At trial in 1991, Batts relied on claims of negligence and strict liability in tort;[4] but the jury, by special interrogatories, found for Caterpillar on both theories. Following

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[4]Prior to trial, a breach of warranty claim was dismissed as time-barred and is not in issue on appeal.

the denial of his motion for JNOV or new trial, Batts brought this appeal.

Batts presented proof that the forklift should have had a back-up alarm, flashing warning lights, and/or rearview mirrors, and asserted that this failure entitled him to recover under either strict liability in tort (defective and unreasonably dangerous) or negligence (negligent design). On the other hand, Caterpillar presented evidence that there was no restriction on the forklift operator's visibility to the rear and that there was a danger in an operator relying on alarms, lights, or mirrors, as opposed to looking in the direction of travel. One of its principal defenses was that the absence of such devices, and the concomitant danger of the operator not facing in the direction of travel, was open and obvious to the forklift owner and its employee operator (users) and that, under Mississippi law, this barred recovery by Batts.

Several of the jury instructions and a special interrogatory incorporated this open and obvious bar. (As discussed infra, the jury was instructed that Batts could not recover under negligence or strict liability in tort if the danger was open and obvious.) Batts' challenge to those items is the primary thrust of his appeal. (In notes 5 and 6, we quickly dispose of the other issues

raised by Batts[5] and Caterpillar (which did not cross-appeal)[6].) In reviewing

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[5]Batts contends that several instructions and a special interrogatory improperly commented on the evidence. (We reject Caterpillar's contention that Batts did not preserve these objections.) The items so challenged were consistent with the evidence and the various claims and theories in issue. Contrary to Batts' contention, they were not peremptory; and, taken as a whole, the charge was proper, as discussed infra.

[6]Caterpillar contends on two bases that the district court erred in denying it summary judgment or a directed verdict. First, it relies on the theory of superseding proximate cause. The jury was instructed on that defense and given a special interrogatory. The lead person in the blending department and a co-employee who sometimes operated the tugger testified that no back-up alarms were in place. On the other hand, the plant engineer testified that a back-up alarm bell was installed on the Towmotor forklift in 1980 or 1981. But, he had no knowledge that the alarm was functional on the day of the accident, or even six months or a year prior to it. And, the mechanic in charge of maintaining Flavorite's forklifts testified that the forklift Johnson was driving had a back-up bell; that it was Flavorite's practice to check the alarm bells every 30 days; that replacement bells were needed for the forklift one or two times a year, because they would get knocked off or operators would tamper with them; that he examined the

this challenge to jury instructions, "we view the [jury charge] as a whole in the context of the entire case. The judge must instruct the jurors fully and correctly on the law applicable to the case, including defensive theories raised by the evidence." *Crist v. Dickson Welding,* Inc., 957 F-2d 1281, 1287 (5th Cir. 1992). However, the district court is given broad discretion in formulating the charge and special interrogatories, and our review on appeal is deferential. *Bradshaw v.*

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forklift on the day after the accident; and that the back-up bell was working at that time. Accordingly, Caterpillar asserts the proof showed that several years before the accident it equipped the forklift with a back-up warning device; it was in place within a month before the accident; and, if it was not operable at the time of the accident, that fact -- including its removal or destruction -- cannot be charged to Caterpillar.

Second, Caterpillar contends that reasonable minds could not differ regarding warning devices not being needed on the forklift, as demonstrated by the proof that the forklift complied with all industrial standards and consumer expectations. (As discussed infra, "consumer expectations" is a critical issue in a Mississippi strict liability in tort action.)

Caterpillar did not cross-appeal from these rulings. Assuming that we can reach these issues, they were for the jury; the district court did not err in denying the motions.

Freightliner Corp., 937 F.2d 197, 200 (5th Cir. 1991). "'A judgment will be reversed only when the charge as a whole leaves us with substantial and ineradicable doubt whether the jury has been properly guided in its deliberations.'" *Hall v. State Farm Fire & Casualty Co.*, 937 F.2d 210, 214 (5th Cir. 1991) (citation omitted).

Needless to say, we apply Mississippi law in deciding whether the instructions correctly stated the applicable law. Erie *R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Allison v. ITH Imperial* Cozp., 928 F.2d 137, 138 (5th Cir. 1991). And, we review de novo the district court's interpretation of that law. *Salve Regina College* v. *Russell*, _ U.S. _, _, *111* S. Ct. 1217, 1221 (1991). In deciding an unsettled point of state law, Erie requires that we determine how the Mississippi Supreme Court would interpret its own law if presented with the question. *American Waste* & Pollution *Control Co. v. Browning-Ferris, Inc.*, 949 F.2d 1384, 1386 (5th Cir. 1991). When we are required to make an *Erie* guess, it is not our role to create or modify state law, rather only to predict it. *Id.*

Under products liability law, recovery by a bystander against a manufacturer for an injury caused by its product can be an elusive, complex, and difficult concept, especially because of the many terms and defenses and other rules established for Mississippi products liability, and because of resulting inconsistent, if not conflicting, precedent. Batts asserts that only under the theory of assumption of risk, with its subjective standard,

can an open and obvious danger associated with the forklift bar his recovery; that is, the jury would have to find that he knowingly and voluntarily encountered a known risk -- the forklift backing up. But, although a subjective standard is used for assumption of risk, an objective standard, which concerns an ordinary user, not the person(s) actually using or injured by the product, is applied for the open and obvious defense to claims under negligence and strict liability in tort. *Toney v. Kawasaki Heavy Industries, Ltd.*, 975 F.2d 162, 168-69 (5th Cir. 1992); *Gray v. Manitowoc Co.*, 771 F.2d 866, 871 (5th Cir. 1985) ("both the Restatement's theory of strict liability and Mississippi's theories of negligence and implied warranty require an objective appraisal of the obviousness of a product's hazard"); Restatement (Second) of Torts §402A cmt. i (1965) (the product "must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer ... with the ordinary knowledge common to the community"). This objective standard is all that is in issue here.[7]

As discussed infra, we hold that an open and obvious danger to an ordinary user precludes recovery against the product manufacturer under negligence and strict liability in tort. Accordingly, an open and obvious defect precludes Batts' recovery against Caterpillar (the manufacturer),

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[7]Batts maintained that assumption of risk had no application to this case. That bar is not in issue.

regardless of whether he knew, or should have known, of that danger.[8] Therefore, we reject Batts, contention that a bystander's awareness of an open and obvious danger would simply reduce any recovery under Mississippi's comparative negligence standard.[9] We

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[8]In issue is only recovery by an injured bystander against a product manufacturer where the open and obvious bar is raised. Therefore, we are not concerned with, nor do we discuss, other defenses or claims that might be raised. For example, contrary to the position taken by the able dissent, although an open and obvious danger bars recovery against the product manufacturer by an injured bystander, he or she still has a claim against the product user, unless, as here (workers' compensation bar), that avenue of recovery is foreclosed. (In this case liability is shifted not to Batts, but to the user, and hence, workers' compensation.) And, of course, for such a claim, assumption of risk or contributory negligence by the injured bystander could be asserted. But, again, we are not concerned in this appeal with the seemingly limitless array of claims, defenses, bars, and other theories inherent in products liability actions.

[9]The Mississippi comparative negligence statute provides in relevant part:

> In all actions hereafter brought for personal injuries, ... the fact that the person injured ... may have been

now address the bases in Mississippi law for this holding.

A.

1.

It is more than well-established that, for strict liability in tort, Mississippi adheres to the Restatement (Second) of Torts §402A.[10] e.g., *Toney*,

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> guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured

Miss. Code Ann. §11-7-15. The jury was instructed on comparative negligence, as part of the standard charge. See note 8.

[10]That section provides in part:

§402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling

975 F.2d at 165; *Lloyd v. John Deere Co.*, 922 F.2d 1192, 1194 (5th Cir. 1991); *Coca* Cola Bottling *Co. v.* Reeves, 486 So.2d 374, 377-78 (Miss. 1986) (en banc). Moreover, Mississippi law interprets §402A to permit recovery by a "bystander". *Hall v. Mississippi Chem. Express, Inc.*, 528 So.2d 796,, 799 (Miss. 1988) ("Though a bystander,, [plaintiff] is... eligible under" §402A.); *Reeves*, 486 So.2d at 378 ("fact that [plaintiff] may arguably be classified as a bystander" is not bar to §402A action).

In *Reeves*, a bottle fell through a carton being removed from a shelf by someone in the vicinity of the plaintiff, who was injured when the bottle shattered upon hitting the floor. A threshold issue was whether the plaintiff, neither a purchaser nor other form of user, could recover under strict liability in tort. The Mississippi Supreme Court held that he could, noting:

> ... the duty imposed by Restatement §402A to the extent that same has been incorporated into the positive

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> such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Restatement (Second) of Torts §402A (1965).

> law of this state exists in favor of anyone who may reasonably be expected to be in the vicinity of the product's probable use and to be endangered by it if it is defective. Therefore, the fact that [plaintiff] may arguably be classified as a bystander avails [defendant bottler] nothing inasmuch as children accompanying their parents, relatives or persons in loco parentis while shopping or otherwise on the premises may generally be expected to be in the vicinity of the handling of soft drink cartons and to be endangered if those cartons are defective.

486 So.2d at 378 (citations omitted).[11] In so holding, the court noted:

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[11]Likewise, in an "Erie guess" shortly before Reeves, our en banc court reinstated the panel's vacated holding that, under Mississippi law, a manufacturer can owe bystanders a strict liability "duty" that "grows out of the contemplated or normally intended use of its defective product and extends at least to those persons within the area of that use who can reasonably be foreseen to be endangered." *Jackson v. Johns-Manville Sales Corp.*, 727 F. 2d 506, 514 (5th Cir. 1984), *reinstated in relevant part on reh'g*, 750 F.2d 1314,-1317 (5th Cir. 1985) (en banc), cert. denied, 478 U.S. 1022 (1986).

> The justness of allowing bystanders to recover on a strict products liability theory is demonstrably greater than is the case with almost any other potential plaintiff, for the bystander is less able to avoid the accident than almost any other.

Id. at 378 n.2. The open and obvious bar was not in issue in *Reeves*. But, in any event, this footnote is indicative of the competing interests in products liability law that clouds the issue in Batts' case.

The forklift was for indoor use. For that and other reasons, Batts could arguably "reasonably be expected to be in the vicinity of the [forklift's] probable use and to be endangered by it if it is defective." Id. at 378. Several of the instructions included "bystanders" among those to be considered; and much of the language used was similar to that in Reeves. The jury was instructed that Batts was a bystander (Caterpillar does not contest that here) and could "recover for injuries[,] consistent with all of the instructions". The court instructed the jury:

> Manufacturers of products have a legal duty to design products that are not in a defective condition unreasonably dangerous to *users, consumers, or bystanders*. This duty includes the obligation to install safety and warning

> devices which will prevent accidents or injuries which are reasonably foreseeable from occurring.

(Emphasis added.) [12]

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[12]In fact, one of the instructions given for Batts, over Caterpillar's objection, erroneously conflated "ordinary consumer" and "ordinary bystander":

> If you find ... that the forklift was in a defective condition, unreasonably dangerous when sold by [Caterpillar] ... because it failed to have mirrors, audible back-up alarms, and/or flashing warning lights, and that the *danger from the forklift in its defective condition, unreasonably dangerous, was not reasonably foreseeable by the ordinary consumer or bystander with the ordinary knowledge common to the community as* to the *characteristics in common usage of forklift products* ... and that Myron Batts was injured while the forklift was being used in a manner which was reasonably foreseeable by [Caterpillar], and that the lack of mirrors, audible back-up alarms, and/or flashing warning lights was the sole proximate cause or a proximate contributing cause of Myron Batts's injuries, then in that event your verdict should be for [Myron Batts].

In any event, taken as a whole, the charge does not constitute

For the strict liability in tort claim, the district judge, as requested by Caterpillar, charged that an open and obvious danger cannot render the product unreasonably dangerous. Over Batts objections, the district judge instructed, in part, that

> the plaintiff has alleged that the absence of a back-up alarm, flashing warning lights, and/or rearview mirrors on the forklift ... entitles him to recover against the defendant on the theory of strict products liability. ... [I]n order for the plaintiff to prevail on this theory he must prove by a preponderance of the evidence that the forklift ... was in a defective condition when it was sold in 1965 and *unreasonably dangerous* to the *user of the* forklift and that the defective condition, if any, was a proximate cause of the ... accident ....
>
> ... [T]o find the forklift ... to be in a defective condition means that you find that there was something wrong with the [forklift]. *To find* that the *forklift was unreasonably dangerous means* that *the forklift posed some danger beyond the contemplation of the ordinary user of the forklift*.

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reversible error.

> ... *[A]ny alleged danger which is open and obvious cannot be considered* to be *unreasonably dangerous.*

(Emphasis added.) After giving the strict liability instruction, the district judge later reemphasized -- without specifying under which theory of recovery -- the preclusion to recovery if the following danger was open and obvious:

> If you find ... that the operation of the forklift ... without the driver facing in the direction of travel and without sounding the manual horn to warn a pedestrian presents an open and obvious danger, regardless of whether the forklift was equipped with [a mirror or warning device], then ... it is your sworn duty to return a verdict for the defendant.

Finally, a special interrogatory asked correctly whether, on the date of the accident, "the defect, if any,, was open and obvious to *a reasonable and prudent user....* " (Emphasis added.)[13] The

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[13]This was the third interrogatory; the first two, which the jury answered in the negative, asked whether "Caterpillar was negligent in its design of the forklift" and whether "the forklift as manufactured and sold by Caterpillar was defective and unreasonably dangerous at the time of the sale and delivery". The jury was instructed to stop if it answered "no" to these two. Accordingly, it did not

jury was instructed properly that if it so found, it was to find for Caterpillar. Concerning the challenged instructions that incorporated open and obvious danger elements, as well as the corresponding special interrogatory, the charge, as a whole, was correct; we are not left "with substantial and ineradicable doubt whether the jury [was] properly guided in its deliberations. *Hall*, 937 F.2d at 214.

2.

Batts admits that "the patent danger doctrine ... has been embraced by Mississippi jurisprudence in the past", but contends that the Mississippi Supreme Court has now "laid to rest" the notion that an open and obvious danger exonerates the product manufacturer from strict liability in tort. Along that line, the Mississippi Supreme Court has adhered to a "consumer expectation" test. In *Ford Motor Co. v. Matthews*, 291 So.2d 169, 172 (Miss. 1974), it stated that liability lies under §402A "only when the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him. I " (Quoting Restatement (Second) of Torts 5 402A cmt. g (1965)). As a gloss on the terms "unreasonably dangerous", it quoted comment i, stating: "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases

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reach the open and obvious danger interrogatory.

it, with the ordinary knowledge common to the community as to its characteristics." *Id.* (quoting Restatement (Second) of Torts §402A cmt. i (1965)). As discussed infra, the Mississippi Supreme Court has continued to use this approach. *E.g, Toliver v. General Motors Corp.*, 482 So.2d 213, 218 (Miss. 1985) (citing §402A cmt. g and Ford Motor, 291 So.2d at 169).

Accordingly, based on Mississippi's choice to define "unreasonably dangerous" by reference to a reasonable, or ordinary, consumer's expectations of product performance, our court has held, as discussed infra, that there is no strict liability in tort under Mississippi law for a patent -- open and obvious -- danger. "[A] product that has an open and obvious danger is not more dangerous than contemplated by the consumer, and hence cannot, under the consumer expectations test applied in Mississippi, be unreasonably dangerous." *Melton v. Deere & Co.*, 887 F.2d 1241, 1243 (5th Cir. 1989). (As quoted above, Batts' jury was so instructed.) *See also Gray*, 771 F.2d at 869 ("the consumer expectation test of section 402A ... requires that harm and liability flow from a product characteristic that frustrates consumer expectations"; "the patent danger bar adopted by the Restatement was incorporated into Mississippi's doctrine of strict liability"). This rule is discussed fully in this court's recent decision in Toney, 975 F.2d at 165-66 (motorcycle owner injured in collision; claimed motorcycle should have had leg guards).

Batts concedes that decisions by our court support Caterpillar's

contention that the consumer expectation test applies, as opposed to a risk utility analysis.[14] He asserts, however, that our interpretation is at odds with the position taken by the Mississippi Supreme Court in two decisions in 1988, *Whittley v. City of Meridian,* 530 So.2d 1341 (miss. 1988) and *Hall v. Mississippi Chemical Express, Inc.,* 528 So.2d 796 (Miss. 1988), as well as in *Toliver*, rendered in 1986.

First, these cases do not persuade us that Mississippi has fundamentally shifted its test from one of consumer expectation to risk utility. Second, even if we agreed with Batts, we would be bound by the interpretation given by a prior panel of this court in Melton (which rejected a similar contention,

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[14]For example, the Supreme Courts of New Jersey and Texas have applied the latter. See, *e.g., Ryan v. KDI Sylvan Pools, Inc.,* 121 N.J. 276, 290, 579 A.2d 1241, 1248 (1990); *Turner v. General Motors* Corp., 584 S.W.2d 844, 851 (Tex. 1979). Under the risk-utility approach, "a product can be said to be defective in the kind of way that makes it unreasonably dangerous, if a reasonable person would conclude that the danger-in-fact, whether foreseeable or not, outweighs the utility of the product. " W. Page Keeton et al., Prosser and Keeton on the Law of Torts §99, at 699 (5th ed. 1984).

887 F.2d at 1243) and *Toney*.[15] No Mississippi case has appeared since *Melton* was rendered in 1989 to indicate that its analysis of Mississippi law was incorrect.[16]

3.

As noted, there is no contention that Batts was a "user". At trial, Caterpillar repeatedly stated that the owner was the "user"; there is no charge that Batts, in performing his duties with the tugger, or otherwise, was working in conjunction with the forklift, so as to make him a "user" of it; and, in fact, the district court instructed that Batts was a "bystander". As discussed earlier, Batts status as a "bystander" does not prevent him from asserting a §402A claim that the forklift was defective and unreasonably dangerous. Among other things, he had

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[15]"'In this circuit one "panel may not overrule the decision, right or wrong, of a prior panel, in the absence of en banc reconsideration or superseding decision of the Supreme Court.'" *Burlington M. R.R. v. Brotherhood of Maintenance of Way Employees*, 961 F.2d 86, 89 (5th Cir. 1992) (citations omitted).

[16]*Batts* also requests, in the alternative, that we certify this question to the Mississippi Supreme Court. Our law is clear; the Mississippi law upon which our precedent is based is unchanged. We thus decline to do so.

to prove that (1) he could "reasonably be expected to be in the vicinity of the [forklift's] probable use and to be endangered by it if it is defective", *Reeves*, 486 So.2d at 378; and (2) "the [forklift] was defective and ... its defective condition made the [forklift] unreasonably dangerous to him", *Toliver*, 482 So.2d at 216 (emphasis in original). As discussed and quoted *supra*, in proving that a product was "defective and unreasonably dangerous", Mississippi applies the consumer expectation test -- the product is (1) "defective" when, at the time it leaves the seller's hands, it is in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him; and (2) "unreasonably dangerous" when it is dangerous to an extent beyond that which will be contemplated by the ordinary consumer, with the ordinary knowledge common to the community as to its characteristics.

Simply put, *products liability*, whether under negligence or strict liability in tort, does not focus on the status of the plaintiff; instead, it *focuses on the* product. The focus is not on whether the injured party is a consumer, or user, or bystander, or whether the product is unreasonably dangerous to a particular person. *E.g.*, *Toney*, 975 F.2d at 169; *Gray*, 771 F.2d at 869 (discussed *infra*); *Page v. Barco Hydraulics*, 673 F-2d 134, 138 (5th Cir. 1982).[17] Moreover, as discussed, the

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[17]This court stated in *Page*:

> ... *[I]n strict liability the focus is on* the *safety of the product*

inquiry for strict liability is not whether the product was dangerous; it is whether it was *both defective and unreasonably dangerous*. For example, an ordinary kitchen knife is dangerous, simply because of its blade; but, it is not *unreasonably* dangerous, because the ordinary consumer understands that the blade, due to its sharpness or point, can cause injury. In products liability cases, by which we impose liability on a manufacturer, among others, it is the *product* -- the item placed in commerce for use or consumption -- on which liability turns.

Accordingly, even when the bystander is the injured party, the test must remain the same -- the product is defective if, when it leaves the seller's hands, it is in a condition not contemplated by the ordinary consumer, which will be unreasonably dangerous to him; and, it is unreasonably dangerous if it is dangerous to an extent beyond that which will be contemplated by the ordinary consumer, with the ordinary knowledge common to the community as to its characteristics. This is essentially how the district court instructed the jury.

> *itself*. The question is whether the product meets the reasonable expectations of the ordinary consumer as to its safety, irrespective of all... the care that the manufacturer might have put into making it.

673 F.2d at 138 (citations omitted).

Our decision in *Gray*, followed in *Melton* and *Toney*, controls an open and obvious danger precluding strict liability in tort recovery by a bystander against a manufacturer. (All three cases concerned injured users, not injured bystanders.) While Gray was changing sections of a crane boom, the crane operator swung the boom, striking Gray.[18] 771 F.2d at 867. He sued under strict liability in tort, implied warranty, and negligence, contending, *inter alia*, that there was a design defect in the crane, because the operator's vision was obscured to the left side, and that the crane should have provided mirrors or other devices to compensate.

The defendant manufacturer contended that the hazard was "open and obvious to ordinary users of the crane" and constituted a bar under any theory of products liability. Id. at 868. (*Gray's* holding for negligence is discussed in part II.B.) As for strict liability in tort, our court felt "bound to apply" the consumer expectation test, and stated: "the consumer expectation test of section 402A is rooted in the warranty remedies of contract law, and *requires that harm* and liability *flow from a product characteristic that frustrates consumer expectations.*" Id. at 869 (emphasis added).

Gray was rendered six months before the Mississippi Supreme Court expressly

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[18]Because Gray was working with, or on, the boom, we consider him a user, not a bystander.

held in *Reeves* what earlier Mississippi cases had implied -- that a bystander could recover under §402A. *Gray* does not make a distinction between "users" and "bystanders"; the latter is not mentioned. It is true, as noted in the dissent, that a bystander's expectations, if any, about a product would not necessarily include knowledge of a danger that is open and obvious to an ordinary consumer; but, again, the test under Mississippi law for whether a product is defective and unreasonably dangerous do not focus on the actual user or the actual bystander (the person actually using or injured by the product) but, instead, focuses on the ordinary consumer with ordinary knowledge common to the community as to its characteristics. For this reason, *Gray* held that "the Grays' right to recover under the theory of strict liability depends upon whether the evidence was sufficient to permit the jury to find that the ... crane was dangerous to an extent not contemplated by the *ordinary consumer* who purchased it, with the ordinary knowledge common to the community as to its characteristics.' Id. at 870 (emphasis added). Again, this rule is solidified in *Toney*.[19]

As noted, in the challenged strict liability instructions, the district

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[19]The dissent posits that we fail to explain why the consumer expectation test applies to bystanders. In short, as discussed above, Mississippi law and our circuit precedent require it. The same is true for our holding on the negligence claim.

court instructed that "any alleged danger which is open and obvious cannot be considered to be unreasonably dangerous" and that the jury was to return a verdict for Caterpillar if it found "that the operation of the forklift ... without the driver [user] facing in the direction of travel and without sounding the manual horn to warn a pedestrian presents an open and obvious danger, regardless of whether the forklift was equipped with [a mirror or warning device]. ..." In addition, as also noted, in a special interrogatory, the jury was instructed that if it found "[t]hat the defect, if any, was open and obvious to a reasonable and prudent user on" the date of the accident, then it must return a verdict for Caterpillar. This was a correct statement of the law, even for a bystander plaintiff.

B.

For the negligence claim, as discussed, whether the danger is open and obvious is also measured by an objective -- reasonable person -- standard, e.g., *Toney*, 975 F. 2d at 168-69; *Gray*, 771 F. 2d at 871. In instructing the jury, over Batts' objections, on that claim, the district judge stated:

> ... [T]he duty of a manufacturer is to provide a product which is reasonably fit. There is no duty to provide a perfectly safe product. [Batts] alleges negligence in the design of the forklift ... involved in the accident.... In order for [him] to recover under this theory, ... the burden of proof is upon [him] to prove...

> that the absence of [a mirror or warning device] constituted a concealed or hidden dangerous condition, thereby making the forklift defective and unreasonably dangerous. If you find ... that the alleged danger of the forklift ... was open and obvious, and that the forklift functioned properly for its intended use, then ... you must return a verdict for the defendant as to [Batts'] claim of negligent design.

As quoted earlier, the district court also gave a general instruction that the jury had to find for Caterpillar if it found that a driver operating the forklift without facing in the direction of travel and without sounding his horn presented an open and obvious danger. And, it gave the special interrogatory on open and obvious danger.

The district court's instruction is consistent with *Toney* and *Gray*.[20] And, Gray relied on decisions by the Mississippi Supreme Court in *Harrist v. Spencer-Harris Tool Co.*, 244 Miss. 84, 140 So.2d 558 (1962) and *Jones v. Babst*, 323 So.2d 757 (Miss. 1975). As in *Gray*, those Mississippi cases concerned injured users, not injured bystanders.[21]

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[20]Indeed, at the charge conference, the district judge placed considerable reliance on *Gray*.

[21]In *Harrist*, decided before the adoption of strict liability in tort in Mississippi, the plaintiff

"employee-user" alleged negligence in the design of steps aboard an oil rig. 140 So.2d at 559. He requested that the court abolish the privity of contract rule for products cases grounded in negligence and implied warranty. Id. at 561. The court found it unnecessary to do so because, assuming it would, it [sic]

> would be required to affirm the trial court because the alleged defects are not considered to be latent or concealed. If we assume there were defects, we think they were *apparent and obvious* to a casual observer.

Id. (emphasis added). Despite the opportunity presented for the court to hold that the obviousness of the danger was a comparative negligence factor, it held instead that the defendant's negligence vel non in designing the steps was not even a jury question.

In *Jones,* the court quoted with approval this court's opinion in *Ward v. Hobart Manufacturing Co.,* 450 F.2d 1176, 1180 (5th Cir. 1971), stating that *Ward*

> set out the general *rule for negligent design cases followed by this Court;* "[W]here the alleged danger is open and obvious and the manufacturer has done everything necessary to insure that the machine will function properly for its designed purpose any duty owed to a future user has been fulfilled."

Gray held that:

> a manufacturer's liability for product defects under Mississippi's doctrines of negligence and implied warranty may not, as a matter of law, be premised on the existence of an obvious hazard in a product which functions properly for its intended purpose.

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323 So.2d at 759 (emphasis added). The court affirmed a directed verdict for the manufacturer on strict liability and negligence claims, because there was no evidence supporting those theories; it found the evidence instead supported a hypothesis that the subject accident resulted from improperly attaching lug nuts in repairing an automobile tire. Accordingly, a jury verdict against the defendants involved in the repair was affirmed.

In applying Mississippi law, we, of course, are controlled by decisions by the Mississippi Supreme Court; but, it does appear that *Jones* overstates the holding in *Ward*, a pure negligent design case brought by a plaintiff injured while cleaning a meat grinder. 450 F.2d at 1178, *1180*. Gray, however, ruled that the Mississippi Supreme Court would follow Jones. 771 F.2d at 868 n.1.

Gray, 771 F.2d at 868.[22] *Toney* repeats this rule. 975 F.2d at 169. We are not cited to, nor have we found, a Mississippi case holding that an open and obvious danger, without more, can bar recovery for a products liability negligence claim by a bystander. But, as discussed *supra*, the focus in products liability is on the product. Moreover, for negligence, and as the Batts' jury was instructed, the manufacturer's duty is to produce a reasonably safe product. Therefore, Gray controls.

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Batts contends, however, that recent premises liability decisions by the Mississippi Supreme Court control. Liability for negligently designed products is, of course, merely one form of common law negligence, to which the ordinary rules of negligence apply.

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[22]*Toney and Gray* are this court's latest pronouncements on the open and obvious defense in a Mississippi negligent design case. *Melton* concerned only strict liability in tort, 887 F.2d at 1242; and in *Lloyd* (1991) (open and obvious danger to injured user; improper design and failure to warn claims; directed verdict granted), "while we ... applied the standard for a directed verdict as to all three theories, or bases, for liability [negligence, warranty, strict liability in tort], and [found] it correctly granted for each, our analysis [was] couched in the language of §402A strict liability." 922 F.2d at 1194 n.2.

E.g., *Toliver*, 482 So.2d at 219 ("[S]trict liability "does not preclude liability based upon the alternative ground of negligence ..." .... Under this theory, the usual defenses to a charge of negligence would apply." (citations omitted)). And, in some types of negligence cases in Mississippi involving open and obvious dangers, the jury may find for the plaintiff, and then apply comparative negligence. *E.g., Goodwin v. Derryberry Co.*, 553 So.2d 40, 43 (Miss. 1989). In *Goodwin*, a premises liability case, the Mississippi Supreme Court cited its earlier premises liability decision in *Bell v. City of Bay St. Louis*, 467 So.2d 657, 664 (Miss. 1985), which stated:

> In prior cases involving hazards that were extremely "open and obvious", this Court has not barred injured parties from recovery, but rather has left the issue to the jury properly instructed regarding comparative negligence. ...
>
> We have repeatedly condemned jury instructions which, if followed by the jury, would completely deny a negligent plaintiff recovery, even though the defendant may also be negligent.

See also Caruso v. Picayune Pizza Hut, 598 So.2d 770 (Miss. 1992) (affirming jury verdict against plaintiff who stumbled on mat placed over loose stripping; mat was "open and obvious", and question went to jury properly instructed on comparative negligence); *Biloxi Regional Medical Ctr. v. David*, 555 So.2d 53, 56 (Miss. 1989) (Conditions are not either open and

obvious or not open and obvious. Common sense and experience negates an either or categorization of such conditions. Just how open and obvious a condition may have been is a question for the jury in all except the clearest of cases.'" (quoting Bell, 467 So.2d at 664)).[23]

Batts contends that these cases control; but they concern premises, not products, liability. We do not find them persuasive in making our *Erie* guess on this issue. This is aptly demonstrated by a simple, but conclusive, analogy in *Bell*. In rejecting the claim that recovery in a premises liability action was barred if the danger was open and obvious, the Mississippi Supreme Court noted: "We might as well exonerate as a matter of law a defendant who leaves his car parked in the middle of the street on grounds that the car was open and obvious." 467 So.2d at 664. In this example, it was not a defect in the product (automobile) that caused the injury; it was the negligence of its owner, who left it in the middle of the street. The same is true for this

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[23]The Mississippi Supreme Court presumably relied on this "clearest of cases" exception when, in *McGovern v. Scarborough, 566* So.2d 1225 (Miss. 1990), it affirmed a directed verdict against a plaintiff who stumbled on a raised threshold when entering a business premises. The court expressed concern at the prospect of creating a jury question for "any doorway from the street which is not on the same level as the street." Id. at 1228.

products liability negligence claim. The forklift was operated in reverse and struck Batts, a bystander. The jury found that a product defect did not cause the injury.

Consistent with our *Erie* holding for a strict liability in tort claim, an open and obvious danger in a product bars recovery on a products liability negligence claim by an injured bystander against the product's manufacturer. Indeed, as discussed, there is a whole body of products liability law dating from *Harrist* that effectively absolves a manufacturer from liability resulting from open and obvious product defects. Therefore, the district court correctly instructed the jury that, if it found "that the alleged danger of the forklift ... was open and obvious", it must return a verdict for Caterpillar on the negligent design claim.

III.

For the foregoing reasons, we

AFFIRM.

E. GRADY JOLLY, Circuit Judge, specially concurring:

I concur in Judge Barksdale's opinion. I write separately only to set out in one place the principles of Mississippi products liability law that control this case today: First, I would emphasize that a manufacturer's duty to exercise due care in designing a product that is reasonably safe should not be confused with a manufacturer's strict liability for a defective product that is unreasonably dangerous. A manufacturer who has not negligently designed a product may nonetheless, in given cases, be held strictly liable for producing a defective product that is unreasonably dangerous. Thus, the distinction between the two standards may be critical.

In order to recover on a negligent design claim, the burden is on the plaintiff to prove that the defendant manufacturer failed to exercise due care in designing the product. The manufacturer may then raise, in the nature of an affirmative defense, that the claimed defect was open and obvious. If the manufacturer demonstrates, as a matter of law, that the defect in the product would be open and obvious to a casual observer, the plaintiff will be barred from recovery under his negligence claims, because "no duty rests upon a manufacturer or seller to warn a purchaser of a dangerous design that is obvious." Harrist v. Spencer-Harris Tool Co., 140 So.2d 558, 562 (Miss. 1962). Moreover, one factor that is often considered when determining whether a manufacturer breached its duty to design a reasonably

safe product is "the conformity of [its] design to the practices of other manufacturers in its industry at the time of manufacture." Ward v. Hobart Manufactoring Co., 450 F.2d 1176, 1182 (5th Cir. 1971). This factor is often determinative because in most cases it serves as a reliable indicia of the standard of care that a reasonably prudent manufacturer would exercise.

In order to recover on a strict products liability claim based on a design defect, the plaintiff need only prove that the manufacturer produced a defective product that is unreasonably dangerous to the ordinary consumer, and that the product was defective when it left the control of the manufacturer. Traditional negligence notions of fault and care are not relevant in making this determination; the primary focus of the inquiry is on the character of the product, not on the conduct of the manufacturer. A manufacturer may be strictly liable even if it has exercised all possible care in making the product, if that product is dangerous to an extent beyond that which would be contemplated by an ordinary consumer with the ordinary knowledge common to the community of the product's characteristics. See Restatement (Second) of Torts, § 402A, comment i. It follows that a product with an open and obvious defect is not "dangerous to an extent beyond that which would be contemplated by an ordinary consumer," and thus cannot be unreasonably dangerous. In strict products liability claims, then, the open and obvious nature of the defect is necessarily tied to the definition of an unreasonably dangerous product. Under the consumer

expectation test, a plaintiff can never prove that an alleged defect renders a product unreasonably dangerous if that defect is open and obvious to the ordinary consumer or user.

We thus make clear that, concerning strict products liability claims, Mississippi follows the consumer expectations test, that this test is an objective one, that whether the product is unreasonably dangerous is judged from the point of view of the ordinary consumer or user, and that if the alleged defect or danger is open and obvious to an ordinary consumer or user, the product is not unreasonably dangerous as a matter of law. Thus, although a bystander can recover against a manufacturer, he stands in the shoes of the ordinary consumer, because the test's primary focus is on the characteristics of the product and not the individual status and viewpoint of the individual plaintiff. With respect to negligent design claims, a traditional negligence analysis is employed, with its focus on whether the product has been designed with due care by the defendant manufacturer. The open and obvious nature of the alleged defect can be raised, and if proved as a matter of law, the defense will operate to bar the plaintiff's recovery; material factual disputes with respect to the open and obvious defense, both with respect to strict liability claims and negligent claims, are to be resolved by the jury.

Thus, applying these principles to the case before us, we have concluded that Batts' strict products liability claims fail because the evidence fully

supports that the alleged defects in the forklift were open and obvious to an ordinary consumer or user and thus the forklift was not an unreasonably dangerous product. With respect to Batts' negligence claims, we have concluded that, under Mississippi law, Batts' claim is barred because the evidence supports the finding that the alleged defects in the forklift were open and obvious to a casual observer.[1]

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[1]The dissent states that "denying Batts recovery under strict liability because the danger of the forklift is open and obvious to an ordinary consumer, shifts the liability costs from the manufacturer, in this case, Caterpillar, to Batts." In our view, this statement is inaccurate. To the extent that the holding of the majority opinion 'shifts" liability, it does so to the purchaser, user, employer, and/or operator; it does not shift the liability to Batts himself. Indeed, Batts, employer has already accepted statutorily imposed liability and has remitted payment to Batts under Mississippi's workers' compensation program. The removal of one 'deep pocket" defendant is just not tantamount to the shifting of liability to the tort victim himself.

The dissent argues that "this court's willingness here to extend user injury analysis to a bystander case, in my opinion, is not what the Supreme Court of Mississippi would do, were it ruling on this issue." The dissent ignores the principle that we are not permitted to guess what the Mississippi Supreme Court might do when the present

law is perfectly clear. Mississippi has expressly stated on numerous occasions that it follows the Restatement and that it follows the consumer expectation test. This test evaluates the product's defect from the point of view of the ordinary consumer. The rule explicitly states that if the product meets consumer expectations, it is not defective. In other words, consumer expectations define what is and what is not an unreasonably dangerous product. The Mississippi rule--at present clearly enunciated--leaves no room for a "bystander expectation" test to define an unreasonably dangerous product. Thus, to address the dissent's suggestion that we are only engaging in an "analytically convenient argument": The reason the consumer expectation test applies to bystanders is because the test specifically and expressly defines a manufacturers liability for injury alleged to have been caused by its products. Moreover, as we have said in the body of the opinion, the test of whether a product is unreasonably dangerous, places the primary focus on the characteristics of the product and not the individual status and personal viewpoint of the particular plaintiff.

With respect to the negligent design claim, the dissent states:

> However, if he is viewed as a "bystander," then I agree with Batts that the open and obvious test requires two significant modifications. First, the person to whom the danger must objectively be

> open and obvious is Batts, not the user of the forklift. Second, the defense is not an absolute bar, but, like in ordinary negligence actions, is subject to comparative negligence.

We think this quote misstates the applicable law. The test employed for negligent design claims is whether the alleged defect or danger is open and obvious to a casual observer--a category that surely applies to Batts. The consumer expectation test is not applicable to negligent design claims. Thus, the first "modification" is no modification of Mississippi law; it is simply a restatement of current Mississippi law on negligent design. With regard to the second 'modification," we have no authority to make this type of change in the law; the Mississippi Supreme Court has said that the defense is an absolute bar, and thus we are bound to follow its dictate. Of course, the Mississippi Supreme Court can change this rule if it wishes, and, indeed, it might; the point is that it has not and its present law is clear.

Similarly, the dissent argues that "[t]he crucial distinction between these cases and the instant case is that a bystander is generally not aware of the dangers that are, or should be, open and obvious to an owner, consumer or user." As stated above, the test used in negligent design claims is whether the defect is open and obvious to a <u>casual observer;</u> Batts, as a "bystander," and as a casual observer who worked in the

plant where the forklift was used, would clearly fall within this category of persons to whom the defect of the forklift would have been open and obvious.

BRIGHT, Senior Circuit Judge, dissenting:

I respectfully dissent here because I believe the Supreme Court of Mississippi would consider the status of the person injured by a product in determining whether the open and obvious danger rule bars that person from recovering in a products liability suit. Specifically, I believe the court, at a minimum, would apply a premises liability approach to application of the rule in a negligence case, in which a bystander, injured by a product, brings suit against the manufacturer.

I agree with this court that, for purposes of users and consumers, strict liability focuses on whether a particular product is dangerous, and not on the status of the person injured. Ante at 16. I also agree with this court's reading of *Ford Motor Co. v. Matthews*, 291 So. 2d 169 (Miss. 1974), its progeny, *Tolliver v. General Motors Corp.*, 482 So. 2d 213 (Miss. 1985) and *Hall v. Mississippi Chemical Express, Inc.*, 528 So. 2d 796 (Miss. 1988), and this court's prior decisions in *Gray v. Manitowoc Co., Inc*, 771 F-2d 866 (5th Cir. 1985); *Melton v. Deere & Co.*, 887 F.2d 1241 (5th Cir. 1989); and now *Toney v. Kawasaki Heavy Indus., Ltd.*, No. 91-1577 (5th Cir. Oct. 7, 1992) that the Mississippi Supreme Court has adopted the "consumer expectation" test in determining strict liability under section 402A of the Restatement (Second) of Torts. Ante at 13. Moreover, I acknowledge this court has ruled that, for purposes of "users," there is no recovery for a patent, open and obvious danger. *Melton*, 887 F.2d at 1243.

Finally, I do not disagree that the Mississippi Supreme Court employs an objective standard in applying the consumer expectation test. *Gray*, 771 F.2d at 871.

However, I do disagree with this court's application of these cases to the instant case. Each of the above cases relates to a user injury.[1] Collectively, these cases represent a significant body of case law derived from, and specifically tailored to, user injuries. But Batts was a bystander, not a user.[2] There was nothing he

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[1]In Ford, an employee was injured when a truck he was attempting to repair moved forward, pinning him against another truck. In *Toliver*, an owner of a vehicle suffered injuries resulting from a defective gas tank in the car. In *Gray*, an ironworker foreman was injured when the butt end of a crane's boom struck him while he supervised his crew in changing sections on the boom. In *Melton*, a user of a combine was injured in attempting to clean it. In *Toney*, a driver of a motorcycle was injured when he was struck by a car.

[2]This court concedes that Batts was a bystander, and not a user. Ante at 15-16. "Bystanders" are expressly permitted recovery under Mississippi strict liability law. *Hall v. Mississippi Chem. Express, Inc.*, 528 So. 2d 796, 799 (Miss. 1988). See also *Jackson v. Johns-Manville Sales Corp*, 727 F.2d 506, 514 (5th Cir. 1984).

The distinction I draw here between

could have done to avoid the accident because he neither had control over the danger, nor was aware of its presence.

In my opinion, this court's failure to address Batts' bystander status is at odds with the fundamental purpose of strict liability as developed in Mississippi. The Supreme Court of Mississippi has long recognized that the purpose of product liability "is to insure that the costs of injuries resulting from defective products are borne by the manufacturers . . . rather than by the injured persons who are powerless to protect themselves." *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113, 120 (Miss. 1966), cert. denied, *Yates v. Hodges*, 386 U.S. 912 (1967) (quoting *Greenman v. Yuba power Products, Inc.*, 377 P.2d 897, 900-01 (Cal. 1963)). The court has noted that the purpose and subsequent effect of forcing manufacturers to internalize these costs is to create incentives for manufacturers to produce safer products. *See generally id.* at 119.

But denying Batts recovery under strict liability because the danger of the forklift is open and obvious to an ordinary consumer, shifts the liability costs from the manufacturer, in this case, Caterpillar, to Batts. Consequently, Caterpillar has less

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a user and bystander is a narrow one. It applies only for purposes of applying the open and obvious danger rule in a case in which a bystander injured by a product seeks to recover against the manufacturer.

incentive to make its equipment safer. Application of the open and obvious rule here encourages manufacturers to produce goods that are increasingly more dangerous because, in effect, the greater the "open and obvious" danger, the greater the protection from liability the manufacturer enjoys.

This court's willingness here to extend user injury analysis to a bystander case, in my opinion, is not what the Supreme Court of Mississippi would do, were it ruling on this issue.[3] Although analytically convenient, this court's application of a consumer expectation test fails to explain the reason why the test should apply to bystanders.

To the extent Mississippi would apply a different rule for bystanders, Batts should be entitled to recovery. However, I recognize this issue remains a question of first impression in Mississippi and, thus, do not rest my decision on these grounds alone.

In my opinion, an even more persuasive case is made on Batts' negligent design claim. As a general rule, manufacturers have a duty to design reasonably safe products. *Ward v. Hobart Mfg., Co*, 450 F.2d 1176, 1182

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[3]It might very well adopt the rationale of looking to the nature of the accident and the obviousness of the danger to the person injured, as this court did in Page v. Barko Hydraulics, 673 F.2d 134 (5th Cir. 1982).

(5th Cir. 1971). However, if the danger of a particular product is "open and obvious, " and the product functions properly for its intended use, parties are barred from recovery. *See Harrist v. Spencer-Harris Tool Co.*, 140 So. 2d 558, 562 (Miss. 1962).

In Harrist, an employee of the purchaser of an oil rig slipped and fell on the steps of the rig due to "external and visible defects which ... [were] plain and obvious to the purchaser ... Id. at 561. Faced with a possible no privity defense, the court treated the employee as a purchaser and denied him recovery because the defect in the rig was open and obvious.

The bar in *Harrist*, however, does not apply in every case. Whether it applies here should turn on whether Batts is considered a product "user" or a "bystander." If he is a "user" and, as such, should recognize a forklift operating in reverse to be an open and obvious danger, he would be barred from recovering on a negligent design claim. *Id. Ward v. Hobart Mfg. Co.*, 450 F.2d 1176 (5th Cir. 1971), *Gray v. Manitowoc Co.*, 771 F.2d 866 (5th Cir. 1985).

However, if he is viewed as a "bystander," then I agree with Batts that the open and obvious test requires two significant modifications. First, the person to whom the danger must objectively be open and obvious is Batts,, not the user of the forklift. Second, the defense is not an absolute bar, but, like in ordinary negligence actions, is subject to comparative negligence.

Again, the cases on which Caterpillar relies deal exclusively with employees who, unlike Batts, were injured while using the source of the danger which caused their injury.[4] The crucial distinction between these cases and the instant case is that a bystander is generally not aware of the dangers that are, or should be, open and obvious to an owner, consumer or user.

Support for Batts, right to recover comes from premises liability cases in Mississippi. These cases generally hold that recovery for injuries resulting from open and obvious hazards is not automatically barred, but rather goes to the jury on the question of comparative negligence. *Biloxi Regional Medical Center v. David*, 555 So. 2d 53, 56 (Miss. 1989); *Goodwin v. Derryberry Co.*, 553 So. 2d 40, 43 (Miss. 1989); *Bell v. Bay St. Louis*, 467 So. 2d 657, 664 (Miss. 1985).

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[4]As we have observed, in *Harrist*, an employee working on an oil rig was injured when he slipped and fell on stairs on the rig's platform. *Harrist*, 140 So. 2d at 559. In Ward, a woman lost several fingers cleaning a meat grinder manufactured by Hobart and used by the woman and her husband in a small restaurant they owned and operated. Ward, 450 F.2d at 1182. In *Gray*, as discussed above, an ironworker foreman suffered injury when the butt end of a crane's boom struck him while he supervised his crew in changing sections on the boom. *Gray*, 771 F.2d at 871.

In my opinion, the jury "charge as a whole leaves..... substantial and ineradicable doubt, that the jury was properly guided in its deliberations. *Hall v. State Farm Fire & Casualty Co.*, 937 F.2d 210, 214 (5th Cir. 1991). The trial court neither fully nor correctly instructed the jury as to the negligent design or strict liability claims. *See Crist v. Dickson Welding, Inc.*, 957 F.2d 1281,, 1287 (5th Cir. 1992). In my opinion, the jury should have been instructed that if Batts' injuries resulted from open and obvious hazards, his claims were not automatically barred, but were to be weighed against his comparative negligence.

Moreover, as I read the record, there exists little evidence of actual lack of due care on the part of Batts. He neither saw nor apprehended the danger as it bore down upon him. In these circumstances, I do not believe the federal courts should, nor the Mississippi courts would, necessarily bar Batts' recovery on the basis of an open and obvious defect to a user. Accordingly, I would reverse and remand this case for a new trial under corrected instructions.[5]

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[5]The concurrence suggests that, for the purposes of defining strict liability in Mississippi, no real distinction exists between a "consumer" and a "bystander". Similarly, for purposes of negligent design, that opinion suggests "bystander" denotes "casual observer" in determining to whom the danger should be open and obvious. Regardless of the terminology, it seems to be that one in Batts' posture lacks

knowledge of the danger as open and obvious, as a matter of law, by merely watching the general operation of the forklift. The open and obvious danger comes about only when Batts, or one similarly situated, might actually see the forklift while it travelled backwards bearing down upon the person, inasmuch as this machine carried no automatic warning sounds or signals.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI

DELTA DIVISION

MYRON BATTS
Plaintiff

Vs. No. DC88-71-D-D

TOW-MOTOR FORKLIFT COMPANY and
CATERPILLAR INDUSTRIAL, INC.
Defendants

MEMORANDUM OPINION

This is a six-year old products liability case which has come before the district court for a second trip. In March of 1991, this case was tried before the undersigned, and the jury returned a verdict in favor of defendants. Post trial motions for judgment notwithstanding the verdict, or alternatively for a new trial, were denied by the undersigned on April 30, 1991. Plaintiff appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed this district court in all respects. The opinion is reported by the Fifth Circuit at Batts v. Tow-Motor Forklift Company, et al, 978 F.2d 1386 (5th Cir. 1992). The opinion was released on November 25, 1993, and the mandate issued on January 4, 1993. Now, plaintiff has returned to United States District Court under the auspices of Federal Rule of Civil Procedure 60(b)(6), Relief from

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Judgment, for "any other reason justifying relief from the operation of the judgment." The sum and substance of plaintiff's motion travels on the coattails of the Mississippi Supreme Court's decision in Sperry-New Holland v. Prestage, 617 So. 2d 248 (Miss. 1993). With Prestage as his sword, plaintiff asserts that this court incorrectly applied Mississippi products liability law, an error compounded by the Fifth Circuit's affirmance, when it instructed the jury on the open and obvious defense and the "consumer expectation test" consistent with the law of strict liability, Restatement (2d) 402A of the Law of Torts. As explained in this memorandum opinion, the court has now concluded that the jury was improperly instructed on Mississippi products liability law when this case went to trial in March of 1991. Faithful to our Erie[1] duty to apply state law as expressed by the highest court of this state, this court recognizes the "retroactive rule of Prestage." As such, the motion for relief from judgment will be granted. Prior entry of judgment on April 3, 1991, will be vacated, and the case returned to this court's active docket. Before discussing the merits of the motion as advanced by the plaintiff, the court presents some additional background facts which help complete the picture for the issues that the court addresses today.

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[1]Erie Railroad Company v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938); 28 U.S.C. S 1652.

Background

In August of 1984, Myron Batts was employed by Flavorite Laboratories, Inc., where he operated a type of forklift referred to as a "tugger".[2] The room where Batts worked was often noisy, and at least one other motorized forklift operated in the same room. The second motorized lift was operated by a seated driver using controls to his front where the forks were located. On the day in question, Charles Johnson was driving the motorized lift in reverse when he backed into Myron Batts, resulting in injury. At the time of the collision, Batts was working with his lift and was either walking beside or backwards with the tugger. Batts brought suit alleging that the forklift should have had a back-up alarm, flashing warning lights, and/or rearview mirrors. According to Batts, the absence of such warning devices entitled him to recover under either strict liability in tort (defective condition unreasonably dangerous), failure to warn, negligent manufacture for breach of implied and express warranties. Caterpillar's principal defense was that the danger of operating a forklift (the tugger) while not facing in the direction of travel of the operator driven lift was an open and obvious danger. To this end, such open and obvious danger was a complete bar to recovery under Mississippi law.

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[2]A "tugger" is a motorized lift, but it is not driven by an operator. The operator walks behind the lift and guides it.

The trial of this case was conducted before the undersigned on March 25-29, 1991. The jury was instructed on the "open and obvious" defense, sometimes referred to as the "patent danger" rule. In his brief supporting his Rule 60(b)(6) motion, plaintiff asserts that he argued for a "risk utility" instruction in lieu of the consumer expectation test and the inherent "open and obvious" rule. While the court is not disputing this assertion in the absence of a complete transcript of the jury instruction conference, the undersigned merely notes that the record which plaintiff has furnished does not reflect a request for the "risk utility" test. In any event, the point is academic. For the record does indicate that Batts entered several objections to the court's instruction on the "open and obvious" defense. In the case sub judice, the jury returned a verdict for defendant finding the "open and obvious" defense to be a complete bar to recovery. Post trial motions for j.n.o.v. and new trial predicated upon the court's charge to the jury were denied by the undersigned. Appeal was taken to the United States Court of Appeals for the Fifth Circuit. On appeal, Batts argued that this court committed reversible error when it instructed the jury on the "open and obvious" defense. The Fifth Circuit rejected the argument and affirmed the judgment of this court holding that the undersigned had correctly instructed the jury on Mississippi products liability law. See Batts v. Tow-Motor Forklift

Co., 978 F.2d 1386 (5th Cir. 1386).[3] The discussion which follows completes the procedural history of this case which has new life following the Mississippi Supreme Court's decision in Sperry New-Holland v. Prestage, 617 So.2d 248 (Miss. 1993).

Discussion

In 1966, Mississippi adopted the doctrine of strict liability in tort. See State Stove Manufacturing Co. v. Hodges, 189 So. 2d 113, 119 (Miss. 1966). With the adoption of strict liability, the Mississippi Supreme Court no longer required "privity of contract" between the manufacturer of a product and the ultimate consumer, and the plaintiff was relieved of the burden of proving negligence. Fault (negligence) is supplied as a matter of law. Toliver v. General Motors, 482 So. 2d 213, 215 (Miss. 1986); State Stove, 189 So. 2d at 121. With State Stove, the court adopted the statement of strict liability as expressed in Section 402A of the American Law Institute's Restatement of Torts (Second). Section 402A provides as follows:

> (1) One who sells any product in a defective condition *unreasonably dangerous* to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

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[3]A petition for rehearing was denied en banc on December 23, 1992.

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Restatement (Second) of Torts §402A (1965). (emphasis added).

Products Liability Standards

A. Consumer Expectation Test

As noted in Prestage, the Mississippi court has had numerous opportunities to apply strict lability since its adoption in 1966.[4] According to Prestage, 402A is "still the law", in Mississippi.

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[4]See Sperry New-Holland v. Prestage, 617 So. 2d 248, 253 n. 1 (Miss, 1993) (court cites twenty-nine cases where it has applied 402A principles).

However, there is a distinction with a difference with regard to the defining parameters of "defective condition" and "unreasonably dangerous" as expressed in section 402A(1) . Comment (i) to Section 402A of the Restatement (Second) of Torts describes "unreasonably dangerous" as follows: "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." Comment g describes "defective condition" as one, "where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." This standard for lability is known as the "consumer expectation test." In order for a plaintiff to recover under the "consumer expectation test," he or she must prove that injury was caused by a defect in the product which the plaintiff would not know to be unreasonably dangerous. Stated differently, if the plaintiff, in applying the knowledge of an ordinary consumer in the community, sees a danger associated with a product and can appreciate that danger, then there can be no recovery from any injury that resulted from the appreciated danger. Prestage, 617 So. 2d at 254. A product that has an open and obvious danger is not more dangerous than contemplated by the consumer, and hence cannot, under the consumer expectation test applied in Mississippi, be unreasonably dangerous." Toney v. Kawasaki Heavy Industries Ltd., 975 F.2d 162, 165 (5th Cir. 1992), quoting Melton v. Deere & Co., 887 F.2d 1241, 1243 (5th Cir. 1989). As noted in

Prestage, the United States District Courts in Mississippi, as well as the Fifth Circuit Court of Appeals, have consistently held that Mississippi employs the "consumer expectation test" with its inherent "open and obvious" standard in products liability cases. By way of illustration, Prestage, at 617 So. 2d page 254, cites four recent decisions from the Fifth Circuit wherein the "consumer expectation test" was applied to products liability actions. See Batts v. Tow-Motor Forklift Co., 978 F.2d 1386 (5th Cir. 1992); Toney v. Kawasaki Heavy Industries, Ltd., 975 F.2d 162 (5th Cir. 1992); Melton v. Deere & Co., 887 F.2d 1241 (5th Cir. 1989); Gray v. Manitowoc Co., Inc., 771 F.2d 866 (5th Cir. 1985). Prestage seems to leave the impression that the federal courts have been all alone in applying the "consumer expectation" test in products liability law. Of course, this impression would be erroneous as reference to the following cases will demonstrate. See e.g., Kussman v. V & G Welding Supply, Inc., 585 So. 2d 700 (Miss. 1991); Brown v. Williams, 504 So. 2d 1188 (Miss. 1987); Coca Cola Bottling Co., Inc. of Vicksburg v. Reeves, 486 So. 2d 374 (Miss. 1986); Pargo v. Electric Furnace Co., 498 So. 2d 833 (Miss. 1986); Fortenberry Drilling Co., Inc. v. Mathis, 391 So. 2d 105 (Miss. 1980); Jones v. Babst, 323 So. 2d 757 (Miss. 1975); Ford Motor Co. v. Matthews, 291 So. 2d 169 (Miss. 1974).

B. Risk-Utility Test

The alternative definition for "unreasonably dangerous" and "defective condition" is found in the so called "risk-utility" analysis. In Sperry-New

Holland v. Prestage, 617 So. 2d 248, 254 (Miss. 1993), the state supreme court described risk-utility as follows:

> In a 'risk-utility' analysis, a product is 'unreasonably dangerous, if a reasonable person would conclude that the danger-in-fact, whether foreseeable or not, outweighs the utility of the product. Thus, even if a plaintiff appreciates the danger of a product, he can still recover for any injury resulting from that danger provided that the utility of the product is outweighed by the danger that the product creates. Under the 'risk utility' test, either the judge or the jury can balance the utility and danger-in-fact, or risk, of the product. Steven G. Davison, *The Uncertain Search for a Design Defect Standard,* 30 Amer.Univ. L.R. 643, 654 (1981); *See also* John W. Wade, *On the Nature of Strict Tort Liability for Products,* 44 Miss.L.J. 825 (1973).

Prestage, 617 So. 2d at 254.

Prestage was decided by the state supreme court on March 25, 1993. On this date, the Mississippi Supreme Court let the rest of the world in on the best kept secret in Mississippi jurisprudence. In Prestage, the court announced that five years earlier, in 1988, Mississippi products liability law had changed from the "consumer expectation" approach to the "risk-utility" test for defining

"unreasonably dangerous" and "defective condition" as those terms are utilized in 402A. According to the court, it had adopted new law with its decisions in Whittley v. City of Meridian, 530 So. 2d 1341 (Miss. 1988), and Hall v. Mississippi Chemical Express, Inc., 528 So.2d 796 (Miss. 1988).[5] The Prestage court was careful to note that it was not announcing a new rule of decisional law. Instead, the court proclaimed, presumably with a straight face, that Mississippi products liability law had changed with Hall and Whittley five years earlier; and the federal courts had erred in not recognizing the change.

> This Court has clearly moved away from a 'consumer expectations' analysis and has moved towards 'risk utility.' Consistent with the national trend, the two *most recent decisions* of this Court applied a risk utility, analysis to strict products liability.

Sperry-New Holland v. Prestage, 617 So. 2d 248, 256 (Miss. 1993). (emphasis in original).[6] In addition to the above

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[5]Hall and Whittley were both decided in 1988. In Prestage, Hall is cited as a 1987 decision, 617 So.2d at 253; and Whittley is cited as a 1985 decision, 617 So.2d at 255. Apparently, these were errors in proofreading.

[6]The court's claim that its two most recent decisions had applied "risk-utility" is a misstatement and is

quoted text, the court apparently sought to remove any speculation or debate by the federal courts that the change in law did not occur with Prestage, but rather the change had occurred in 1988. Writing for the court, Justice Prather stated, "recent decisions have turned on an analysis under risk-utility." Prestage, 617 So. 2d at 252. "We today apply a 'risk-utility' analysis *as adopted* in Whittley v. City of Meridian, 530 So. 2d 1341 (Miss. 1988) and Hall v. Mississippi Chemical Exp., Inc., 528 So. 2d 796 (Miss. 1987).... "Prestage, 617 So. 2d at 253 (emphasis added). Of course, the most significant difference between "consumer expectation" and "risk-utility" is the merger of "open and obvious" into the risk utility dichotomy. For the case sub judice, this is the major distinction which support plaintiff's Rule 60(b)(6) motion. Prestage explains the "open and obvious" role in the "risk-utility" test for unreasonably dangerous products.

> Having here reiterated this Court's adoption of a 'risk utility' analysis for products liability cases, we hold, necessarily, that the 'patent

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simply not accurate. As it will be discussed subsequently, the most recent decision prior to Prestage which addressed the issue applied the "consumer expectation" test. See Kussman v. V & G Welding Supply, Inc, 585 So. 2d 700, 703-04 (Miss. 1991). As the citation indicates, Kussman was decided in 1991, three years after Hall and Whitley.

> danger, bar is no longer applicable in Mississippi. Under a risk-utility' analysis, the 'patent danger, rule does not apply. In 'risk-utility' the openness and obviousness of a product's design is simply a factor to consider in determining whether. a product is unreasonably dangerous.

Prestage, 617 So. 2d at 256 n.4 (citing Wade, 44 Miss.L.J. 837-838; W. Keeton, D. Dobbs, R. Keeton, and D. Owen, *Prosser and Keeton on the Law of Torts* §99 at 698-99 (5th ed. 1984)).

Typically, jurisdictions which apply "risk-utility" do so only in defective design cases. Under a "risk-utility" theory, a jury may find a product unreasonably dangerous if its design contains excessive danger which could have been prevented. In other words, a product is unreasonably dangerous if the design's inherent risk of danger outweighs the benefit of the design. 63 Am. Jur. 2d Products Liability §546 (1984). Despite the fact that "risk utility" is usually associated with design defect cases only, Prestage makes no such distinction and appears to embrace "risk utility" in all strict lability situations. In time, perhaps the supreme court will provide further clarification.[7]

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[7] See Miss. Code Ann. §11-1-63(a)(b)(f) (Supp. 1993) (Mississippi Products Liability Act enacted by the 1993 Mississippi Legislature incorporates both "consumer

Since Hall and Whittley have now taken on the presence of landmark cases in Mississippi tort law, both merit a second look as the federal court looks for guidance in proceeding with its Erie duty to apply state law when hearing federal diversity cases. Hall v. Mississippi Chemical Express, Inc., 528 So. 2d 796 (Miss. 1988), concerned an appeal from a directed verdict for defendant at the close of plaintiff Is case-in-chief. The supreme court affirmed the Lamar County Circuit Court. The primary issue on appeal turned on factual support in the record linking causation of a fire, which injured the plaintiff, to two defendants. In affirming the lower court, the supreme court agreed with the trial court's finding that the defendants' connection with the fire was simply "too tenuous."

> The case is now down to two possible defendants--the manufacturer and owner/operator of the diesel truck whose ,idling, is said to have ignited the conflagration and caused plaintiff's concededly serious injuries. The facts make clear that factually and legally these defendants' connection with the case is just too tenuous. The Circuit Court directed a verdict at

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expectation" and "risk-utility" language for defective design cases); see also §11-1-63(e) (open and obvious defense retained in failure to warn cases).

> the end of plaintiff worker's case. We affirm.

Hall, 528 So. 2d at 797. Both in the lower court and on appeal, Hall turned on the element of causation. Nothing in the case at either the trial or appellate level even remotely brought "consumer expectation" versus "risk-utility" approaches to section 402A(1) into issue. In commenting on plaintiff's theory of defective design of a Mack diesel truck engine, Justice Robertson noted that notions of fault and privity are not considered under strict liability theories of recovery. Hall, 528 So. 2d at 799. Then, the following two paragraphs appear in the opinion.

> The proper focus in a strict liability case is upon the utility and safety of the product in view of its intended function rather than on the manufacturer's fault or lack thereof.
>
> Here, Hall has utterly failed to prove that the Mack truck was defective in the sense that it was not reasonably fit for its intended uses. Nor has he shown that without the automatic air shutdown device the truck was rendered unreasonably dangerous. To the contrary, the credible evidence is that the truck is perfectly safe and useful for its intended function without such a device.

Hall, 528 So. 2d at 799. Now the Prestage court is claiming that with the use of the word, "utility," in the

opinion, it took a giant leap and extrapolated a landmark adoption of the "risk utility" test for products liability law and rejected the "consumer expectation" standard of the past twenty-two (22) years.

In Whittley v. City of Meridian, 530 So. 2d 1341 (Miss. 1988), the trial judge granted a directed verdict in favor of a garbage bin manufacturer after all of the parties had rested. The jury returned a verdict in favor of the City of Meridian. The plaintiff, a small child who sustained severe injuries when a garbage bin fell on her, appealed from the dismissal of the manufacturer and the jury verdict for the city. Whittley, 530 So. 2d at 1342. Writing for the court, Justice Zuccaro concluded that the trial judge erred in directing a verdict for the manufacturer. Following a discussion of section 402A of the Restatement (Second) of Torts and plaintiff's claim of defective design of the garbage bin, the court stated:

> In determining whether a product is unreasonably dangerous a reasonable person must conclude that the danger-in-fact, whether foreseeable or not, outweighs the utility of the product. This is a question f or the finder of fact.

Whittley, 530 So. 2d at 1347. Following this paragraph which also employs the word, "utility," the opinion then launched into a discussion of superseding causes. Whittley, 530 So. 2d at 1347. Therefore, based upon these comments contained in Hall, and in Whittley, the Mississippi Supreme Court

proclaimed in Prestage that "risk-utility" had been forever adopted in Mississippi products liability law.[8] Prestage, 617 So. 2d at 253.[9] Despite the "adoption" of "risk-utility" in Hall and Whittley, the court apparently had a change of heart, although shortlived, when it

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[8]Hall v. Mississippi Chemical Express, Inc., 528 So. 2d 796 (Miss. 1988), was originally released on May 10, 1988. However, a petition to rehear was filed, which was denied on August 10, 1988. According to Mississippi Supreme Court Rule 41(a), the filing of a petition to rehear will stay the mandate until disposition of the petition. If the petition is denied, as in this case, the mandate will issue seven (7) days after entry of the order denying the petition. Whittley v. City of Meridian, 530 So. 2d 1341 (Miss. 1988) was also released on August 10, 1988, perhaps by coincidence or by design. No petition to rehear was filed in Whittley. Therefore, it appears to the court that the change in Mississippi products liability law occurred on or about August 10, 1988.

[9]See Satcher v. Honda Motor Co., Ltd., 993 F.2d 56 (5th Cir. 1993)(Fifth Circuit Order by Judge Jolly granting petition to rehear, vacating court's opinion at 984, F.2d 135, and remanding to Southern District of Mississippi). The order of remand appears to recognize the retroactive application of Prestage. Satcher, 993 F.2d at 57.

decided Kussman v. V & G Welding Supply, Inc., 585 So. 2d 700 (Miss. 1991). Kussman suffered extensive injuries when he fell from a roof after he was shocked by an electric wrench that had recently been repaired by V & G Welding. Kussman sued V & G Welding for negligent repair of the wrench. The case proceeded to trial, and at the close of all the evidence the court granted a directed verdict in favor of V & G. On appeal, the supreme court reversed and remanded for a new trial finding that the directed verdict was improvidently granted. Kussman, 585 So. 2d at 705. Although Kussman concerned an action in negligence and not one involving a design defect, the court, nonetheless, entered into a discussion of strict products liability standards for defective conditions. Citing pertinent parts of 402A comments, the Kussman court stated:

> Restatement (Second) of Torts §402A, Comment (g), at 351 (1965) states:
>
> > The rule stated in this Section applies only where the product is, at the time it leaves the seller's hand, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.
>
> Rest. (2d) Torts §402A, Comment (i), at 352 (1965) discusses 'unreasonably dangerous' in these terms:
>
> > The article sold must be dangerous to an extent beyond

> that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

Kussman, 585 So. 2d at 703-04, citing Ford Motor Co. v. Matthews, 291 So.2d 169, 172 (Miss. 1974). Of course, this is the classic statement of the consumer expectation test, "adopted" by the Mississippi court three years following Hall and Whittley. Interestingly, Kussman is neither cited nor mentioned in Prestage. Kussman has been swept under a rug and ignored. Erie bound, this court is obligated to do the same.

Rule 60(b)(6) Criteria

Batts has moved for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(6). The Rule provides as follows:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time . . . .

In the case sub judice, the Rule 60(b)(6) motion was filed on or about April 19, 1993. This was less than a month following the court's release of Prestage, which gave the first indication that grounds for a 60(b)(6) motion existed. Clearly, the filing was accomplished within a reasonable time.

The other factors which are pertinent to a Rule 60(b) motion were discussed in detail in a 1981 Fifth Circuit case, Seven Elves, Inc. v. Eskenazi, 635 F.2d 396 (5th Cir. 1981), the most frequently cited opinion for the governing standards for 60(b) relief. The factors for consideration are as follows:

> (1) That final judgments should not lightly be disturbed; (2) that the Rule 60 (b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) (relevant only to default judgments]; (6) whether--if the judgment was rendered after a trial on the merits--the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack.

Seven Elves, Inc., 635 F.2d at 402. The Seven Elves criteria for Rule 60(b) relief are consistently followed. See U.S. v. Flores, 981 F.2d 231f 237 (5th Cir. 1993); Barrs v. Sullivan, 906 F.2d 120, 121 (5th Cir. 1990); Picco v. Global Marine Drilling Co., 900 F.2d 846, 849 (5th Cir. 1990); Smith v. Alumax Extrusions, Inc., 868 F.2d 1469, 1471 (5th Cir. (1989); Bludworth Bond

Shipyard, Inc. v. M/V Caribbean Wind, 841 F.2d 646, 649 (5th Cir. 1988).

The court has considered Batts' Motion for Relief from Judgment in light of the Seven Elves factors and mindful that Rule 60(b)(6) relief from judgment is reserved for extraordinary circumstances. Obviously, the respect for the finality of judgment must be weighed against the court's principal interest that substantial justice be achieved with each case. To this end, this case falls within that "extraordinary" category--if not bizarre. To say the least, the federal courts, and perhaps a few state courts as well, were surprised to learn in March of 1993 that state law had been misinterpreted and misapplied for the past five years. The court trusts that the basis of this surprise is adequately explained in this memorandum opinion.

Conclusion

For the reasons which are explained in this opinion, Myron Batts' Motion for Relief from Final Judgment pursuant to Rule 60(b)(6), is well taken, and the same will be granted by separate order to issue this day. This court's final judgment in the case sub judice entered on or about April 3, 1991, is vacated, and the case is returned to the undersigned's active docket.

THIS _____ day of February, 1994.

_____
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI

DELTA DIVISION

MYRON BATTS
Plaintiff

VS. No. DC88-71-D-D

TOW-MOTOR FORKLIFT COMPANY and
CATERPILLAR INDUSTRIAL, INC.
Defendants

**ORDER GRANTING RELIEF FROM JUDGMENT
VACATING PRIOR JUDGMENT AND
RETURNING CASE TO ACTIVE DOCKET**

In accordance with a memorandum opinion entered this day:

(1.) Plaintiff Myron Batts' Motion for Relief from Final Judgment pursuant to Federal Rule of Civil Procedure 60(b)(6) is well taken, and the same is hereby **GRANTED.**

(2.) Prior judgment entered in this cause on or about April 3, 1991, is hereby, **VACATED.**

(3.) This cause of action is hereby **RETURNED** to the court's active docket.

SO ORDERED.

THIS _____ day of February, 1994.

_____
United states District Judge